No. 05-

IN THE

Supreme Court of the United States

GOSSELIN WORLD WIDE MOVING, N.V.
AND THE PASHA GROUP,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Whether the Fourth Circuit erred in concluding, contrary to the Ninth Circuit and to well-established rules of statutory construction, that an antitrust exemption provided by the Shipping Act of 1984, 46 U.S.C. app. § 1701 *et seq.*, does not apply to activities or agreements relating to the transportation of U.S. military household goods in foreign countries, solely because those activities or agreements also impact the transportation of goods within the United States.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Gosselin World Wide Moving, N.V. has no parent corporation and no publicly held company owns 10% or more of its stock.

The Pasha Group has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

In *F. Hoffm[illegible]a Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004), this Court "caution[ed]" that "in today's highly interdependent commercial word," courts must "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." Congress took precisely such a step in the Shipping Act of 1984, crafting an exemption from the antitrust laws for "any agreement or activity concerning the foreign inland segment of through transportation that is part of the transportation provided in a United States import or export trade." 46 U.S.C. app. § 1706(a)(4). In the decision below, the Fourth Circuit ignored both the text and policy underlying this exemption and, in so doing, created a stark conflict with the Ninth Circuit.

In *United States v. Tucor Int'l, Inc.*, 189 F.3d 834 (9th Cir. 1999), the Court of Appeals held that, under the Shipping Act, shipping companies providing services to American military personnel stationed abroad enjoy immunity from the U.S. antitrust laws, even where the companies' conduct might impact the prices that the Government ultimately pays for their services. This statutory exemption grants due respect to the sovereignty of foreign nations by charging them with the responsibility for policing commercial conduct that occurs within their borders.

Petitioners in this case are a Belgian company and an American company who, like the defendants in *Tucor*, provide shipping services for American servicemen stationed abroad. Relying in good faith on *Tucor*'s interpretation of the antitrust exemption, *see* App. 49a, petitioners entered into agreements with German agents that were virtually identical to the arrangements at issue in that case.

The United States, however, chose to bring not simply a civil action for damages, but a *criminal prosecution* against

petitioners in the hope of persuading another court to depart from the rule in *Tucor*. Indeed, the Government can hardly dispute its manifest forum shopping here. The managing director of one of the petitioners, Gosselin World Wide Moving, N.V. ("Gosselin"), was actually arrested at a trade-association conference in the Ninth Circuit, in Hawaii; rather than charge him or petitioners there, the government conditioned his release upon the company's acquiescence to venue in the Justice Department's favorite venue, the more congenial Eastern District of Virginia.[1]

Even so, the Government met with defeat. The district court (Lee, D.J.) recognized that this case was governed by the plain language of the Shipping Act as construed in *Tucor*. Accordingly, Judge Lee dismissed the antitrust charge. Undaunted, the Government marched on Richmond and prevailed. Reversing the district court, the Fourth Circuit held that, because petitioners' agreement with the German agents raised the total price that the United States pays for shipping, the exemption did not "concern" the "foreign inland segment" of through transportation. In reaching that conclusion in this criminal case, the Court of Appeals not only departed from the plain language of the statute, but it also ignored this Court's "traditional[] ... restraint in assessing the reach of a federal criminal statute," *Arthur Andersen LLP v. United States*, 125 S. Ct. 2129, 2134 (2005), and the parallel rule against extraterritoriality articulated in *Hoffman-La Roche*. This decision creates a direct conflict with the Ninth Circuit and virtually reads the antitrust exemption out of existence.

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[1] Not only was Gosselin's director arrested in the Ninth Circuit, but the American petitioner, The Pasha Group, is a domiciliary of California. The Government's efforts at forum shopping thus can hardly be disputed.

In addition to creating a circuit conflict, the Fourth Circuit's decision extends the U.S. antitrust laws to regulate foreign commercial conduct already subject to the laws of other nations. Indeed, in this very case, the German government has notified Gosselin that, based on the conduct at issue, Gosselin faces a substantial penalty for violation of the German antitrust laws. Conflicting liability standards and multiple penalties are precisely the evils that Congress sought to avoid by crafting the Shipping Act's exemption from the antitrust laws.

Given the Government's ability to select the venue of future criminal prosecutions—particularly where the contracting agency resides in the Fourth Circuit—the Court of Appeals' cramped reading of the exemption will govern all future cases, absent intervention by this Court. The decision likewise stands as a precedent for courts construing other antitrust exemptions to ignore the comity concerns of *Hoffman-LaRoche*. Review is urgently warranted.

OPINIONS BELOW

The Fourth Circuit's decision is reported at 411 F.3d 502 and reprinted in the Appendix ("App.") at 1a-24a. The District Court's decision is reported at 333 F. Supp. 2d 497 and reprinted in the Appendix at 25a-54a.

JURISDICTION

The Fourth Circuit rendered its decision on June 14, 2005, App. 1a, and denied a timely petition for rehearing on July 12, 2005, App. 56a. Justice Thomas extended the time to file this petition up to and including November 25, 2005. This Court has jurisdiction under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

1. The Department of Defense administers the International Through Government Bill of Lading (ITGBL) program to provide for the shipping of personal goods of

civilian and military personnel stationed abroad. App. 28a. This program is run by a defense agency formerly called the Military Traffic Management Command (MTMC).[2] The MTMC administers a bidding process for each route running from a district in a foreign country to an area in the United States. Each shipping route is, in turn, divided into five segments, as the goods are carried from a foreign address to their final destination in the United States: moving services in a foreign country; port services in a foreign country; ocean transport services; port services in the United States; and moving and storage services in the United States. App. 28a. Different agents handle each segment, but these agents do not contract directly with the MTMC. Rather, the overall "through transportation" of military goods from an overseas base to a domestic address, *e.g.*, from Ramstein Air Force Base in Germany to Arlington, Virginia, is the responsibility of freight forwarders (also known simply as carriers), who serve as general contractors that subcontract each segment of the transportation route.

Twice a year, MTMC solicits bids from freight forwarders for what is called the "through rate." App. 28a; *see also* 46 U.S.C. app. § 1702(23) (defining "through rate" as "the single amount charged by a common carrier in connection with through transportation"). Freight forwarders file an initial bid for a particular transportation route. The lowest bidder sets a "prime rate" and is guaranteed a fixed percentage of the shipments for that particular route. The MTMC publishes a list of the lowest five bids, and in a second round of bidding, carriers may match, or "me too," the lowest rate. MTMC will not use freight forwarders with

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[2] The Military Traffic Management Command changed its name on January 1, 2004, to the Surface Deployment and Distribution Command.

higher filed rates, unless those with lower rates have exhausted their capacity. App. 29a.

In determining their bids, freight forwarders must take into account the rates charged by agents on each segment of the transportation route. App. 28a. The ocean transport rate is set by a conference of ocean carriers and so constitutes a fixed cost. App. 29a-30a. The freight forwarder, however, must negotiate with local foreign agents the rates for foreign inland services (moving, storage, and port services). To do this, MTMC requires that each freight forwarder appoint a booking agent to serve as the freight forwarder's local representative. App. 30a.

Petitioners Gosselin, a Belgium company, and The Pasha Group ("Pasha"), a United States company, are general agents for freight forwarders: they book ocean transport services at the fixed ocean transport rate, and they book foreign port and inland services at rates procured from local agents.[3] App. 27a, 30a. In addition, Gosselin serves as an agent for foreign inland services through its subsidiary, Gosselin GmbH. App. 60a.

2. In the Shipping Act of 1984, 46 U.S.C. app. § 1701 *et seq.*, Congress crafted an exemption from the antitrust laws for the ocean and foreign stages of international shipping. Most relevant here, § 1706(a)(4) provides that the antitrust laws shall not apply to "any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or

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[3] Gosselin and Pasha offer freight forwarders a "landed rate," which bundles the rates charged for foreign services (moving, storage, and port services) and for ocean transport, and adds a commission. App. 59a-60a. Because the ocean transport rate is a fixed rate, the only variable is the foreign services rate. *Id.*

export trade." This provision immunizes any conduct that "concern[s]" the segment of "through transportation" that occurs inland in foreign countries. Congress also exempted from the antitrust laws other segments of the shipping routes, including foreign port services, 46 U.S.C. app. § 1706(a)(5), ocean transport services, *id.* §§ 1706(a)(1),(2), and domestic port services, *id.*

Congress created these exemptions based on the understanding that "the antitrust laws will have no place with respect to activities and agreements authorized or prohibited under this bill. The Shipping Act exclusively, as administered by the [Federal Maritime Commission], will prescribe the rules, protections, and sanctions necessary to regulate international shipping effectively." S. Rep. No. 97-414, at 26, 34. Congress also heeded concerns expressed by foreign shippers about limiting the reach of U.S. antitrust laws to activities already subject to foreign jurisdiction. *See 1981 Shipping Act: Hearing Before Subcomm. on Merchant Marine of the Sen. Comm. on Commerce, Science, and Transp.*, 97th Cong. 208 (1981) (statement of Dr. Henry De La Trobe, Vice Chairman, Council of European and Japanese Nat'l Shipowners Ass'n) ("Also to be kept in mind is the fact that other countries take strong issue with the application of the antitrust laws as well as the Shipping Act to transportation arrangements and activities performed within their jurisdictions.").

3. The Ninth Circuit determined the scope of Section 1706(a)(4)'s exemption in *United States v. Tucor Int'l, Inc.*, 189 F.3d 834, 836 (9th Cir. 1999), which involved conduct almost identical to that at issue here. In *Tucor*, the United States alleged that foreign carriers operating in the Philippines conspired with others to suppress competition by fixing prices for the transportation of military household goods between the Philippines and the United States. *United States v. Tucor Int'l, Inc.*, 35 F. Supp. 2d 1172, 1175 (N.D. Cal. 1998), *aff'd*, 189 F.3d 834 (citing Indictment ¶ 2). According to the United States, the defendants entered into

"a price-fixing agreement whose purpose and effect were to force the United States government to pay supra-competitive prices to move U.S. Servicemen's household goods between the United States and the Philippines." Reply Br. for U.S. at 1, 189 F.3d 834 (9th Cir. 1999) (No. 98-10316) (available at 1999 WL 33612244, at *1); *see also Tucor*, 35 F. Supp. 2d at 1184.

In *Tucor*, the defendant initially pled guilty, *id.* at 1175-76, but subsequently filed a petition for a writ of error coram nobis, arguing that the conduct alleged in the indictment was covered by § 1706(a)(4)'s exemption, and was thus lawful. *Id.* at 1176-77. The district court, per Judge Lowell Jensen, agreed and dismissed the indictment.[4] In so concluding, Judge Jensen rejected the Government's argument that the exemption must be construed narrowly. *Id.* at 1180-85 ("Section [1706(a)(4)]'s immunity means what it says"). The court also faulted the lead trial attorney for the Department of Justice for violating his duty of candor by failing to bring attention to the exemption prior to submitting the plea agreement. *Id.* at 1187-88. The Ninth Circuit affirmed, holding that § 1706(a)(4) "clearly applies to any agreement—without limitation—concerning the foreign inland segment of through transportation." 189 F.3d at 837.

4. The *Tucor* decision was publicized and well-known throughout the shipping community. Two years later, acting in reliance on the decision, petitioners engaged in conduct substantially similar to that upheld as lawful by the Ninth Circuit. *See* App. 50a (finding "based upon the Ninth Circuit's decision in *Tucor*, that the Defendants acted in good faith in considering their actions immune from the

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[4] Prior to his appointment to the federal bench, Judge Jensen served as Deputy Attorney General of the United States, Associate Attorney General, and Assistant Attorney General for the Criminal Division.

antitrust laws"). Yet, in a classic case of forum shopping, the Government decided to bring criminal charges against petitioners in the Fourth Circuit. As they had charged the *Tucor* defendants, so too the Government charged petitioners with conspiring with others to eliminate competition by fixing prices for the transportation of military household goods between Germany and the United States. App. 67a. *Cf. Tucor*, 35 F. Supp. 2d at 1175 (citing Indictment ¶ 2).

According to the agreed-upon Statement of Facts, the alleged antitrust conspiracy arose in 2001, after a freight forwarder (identified in the stipulated facts as "FF-1") filed a prime rate for several German-United States routes that was significantly lower than any other freight forwarder's rate. App. 30a. Gosselin's managing director and another local German agent expressed concern that if other carriers matched that low bid, the German agents might be forced to provide services on those routes at an unprofitable rate. As the local German agent explained, "if we do not react and give [the] industry a clear message which rate to base the m/2 [the "me-too" bid] on, then everyone will use the low rate and later expect us to reduce our rates so those carriers can work under their m/2 rates." App. 31a.

Gosselin's managing director suggested that the German agents agree to service only shipments tendered at the second lowest rate (rather than FF-1's prime rate). App. 32a; 62a. The director forwarded this exchange to Pasha's chief executive. Subsequently, twelve of the largest German agents, including Gosselin's subsidiary, entered into an agreement to boycott any freight forwarder that failed to "submit[] me-too bids at the second-low level or above." App. 31a, 63a. Gosselin and another agent advised the freight forwarders by fax of the agreement among the local German agents. App. 32a, 63a-64a. FF-1 subsequently agreed to cancel the low prime rate it initially had filed, and the other freight forwarders tendered me-too bids at the second lowest rate or higher. App. 32a, 64a.

5. The United States arrested Gosselin's managing director at a trade-association conference in Hawaii in October 2003, but conditioned his release upon his consent to venue in the Eastern District of Virginia. *See* http://www.usdoj.gov/atr/public/press_releases/2003/201377.pdf. Charges against the director were ultimately dropped, but the United States charged petitioners by information with a conspiracy to restrain trade, in violation of 15 U.S.C. § 1, and a conspiracy to defraud the United States, in violation of 18 U.S.C. § 371. App. 25a. The fraud charge was not based on any misrepresentation or omission separate from the antitrust conspiracy. Gosselin and Pasha entered into plea agreements conditioned upon the outcome of rulings on the applicability of the Shipping Act's antitrust exemptions to a stipulated Statement of Facts and on whether the stipulated facts established fraud. App. 25a.

Applying the plain meaning of § 1706(a)(4)'s exemption, the district court held that petitioners' conduct "concern[ed]" the "foreign inland segment" of the through transportation route between the United States and Germany, and therefore did not violate federal law: Gosselin, through its subsidiary, provided local agent services in Germany; local German agents provided packing and moving services in Germany; Gosselin and Pasha arranged for local German agent services, as well as European port agent services, and the fixed rate ocean transport services. App. 41a-42a (citing Criminal Information ¶¶ 3, 10, 12). Moreover, the district court held, even assuming petitioners were not immune, the rule of lenity required construction of the antitrust exemption in petitioners' favor. App. 43a. The district court rejected the United States' contention that *Tucor* was not applicable, concluding that in *Tucor*, as here, "the Government charged the defendant with agreeing to eliminate the low prices bid by freight forwarders to the Government and to cause freight forwarders to cancel their low rates." App. 42a.

The district court also held that petitioners were entitled to immunity based on other sections of the Shipping Act.

Petitioners' activity was exempt from the Federal Maritime Commission's tariff filing and publication requirements, and thus immune under § 1706(a)(2) of the Shipping Act. App. 45a-49a. And, even if neither § 1706(a)(4) nor § 1706(a)(2) applied, the district court held that § 1706(c)(1) of the Shipping Act prohibited the retroactive imposition of immunity, because petitioners had acted in good faith in relying on *Tucor* and could have reasonably concluded that their conduct was immune from U.S. antitrust laws. App. 49a.

Finally, the district court determined that, notwithstanding the antitrust immunity, the United States had established a fraud charge because the two charges were not duplicative and the immunity only extended to the antitrust laws. App. 51a. Petitioners each pled guilty to the conspiracy to fraud count, and the district court imposed on each defendant a criminal fine of $4.6 million. App. 7a.

6. The Fourth Circuit reversed the district court's immunity ruling. In the court's view, the case was governed by the rule of construction requiring that exemptions to the antitrust laws be narrowly construed. *See* App. 8a ("[I]f there is any doubt over whether § 1706(a)(4) affords defendants relief, it is settled by the maxim that exceptions to the antitrust laws should be construed narrowly."). Accordingly, the Fourth Circuit determined that, even if petitioners' initial agreement with the local German agents related to the "foreign inland segment," petitioners' communication of that agreement to the freight forwarders was aimed at fixing rates for the entire through transportation route. App. 13a. The Fourth Circuit held that it need not decide whether *Tucor* was correct because the *Tucor* defendants' conduct supposedly occurred entirely within the foreign country, whereas in the instant case, petitioners communicated their "bid-rigging plan" to freight forwarders responsible for the overall through rate. App. 12a. The Fourth Circuit expressed concern that a broad immunity would exempt the through transportation market completely,

neglecting the fact that Congress already has chosen to exempt from the antitrust laws several other portions of through transportation, including the ocean transport rate. *Id.*

The Fourth Circuit also held that petitioners' conduct was not immune under § 1706(a)(2) and § 1706(c)(1). App. 12a-20a. Because the court had concluded that petitioners enjoyed no antitrust immunity, the court did not reach the question whether the Government stated a fraud claim, if petitioners did nothing more than fail to disclose otherwise lawful conduct. App. 20a-21a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CREATES A STARK CIRCUIT CONFLICT AND, CONTRARY TO THE SHIPPING ACT, SUBJECTS FOREIGN SHIPPING TO THE U.S. ANTITRUST LAWS.

The petition for certiorari should be granted because the Fourth Circuit decision creates a sharp conflict with the Ninth Circuit on a matter of substantial importance to the international shipping community. Congress enacted section 7(a)(4) of the Shipping Act of 1984 to prevent the federal antitrust laws from reaching into domains subject to the jurisdiction of other sovereigns. *See* 46 U.S.C. app. § 1706(a)(4); S. Rep. No. 97-414, at 26, 34 (1982) ("[T]he antitrust laws will have no place with respect to activities and agreements authorized or prohibited under this bill.").

This case presents the second time in recent years that the Government has sought to flout those limitations, not merely through a civil action, but through a criminal prosecution against companies whose operations are centered abroad and subject to foreign law. The Ninth Circuit properly restrained the Government's first prosecution, and the district court sought to do the same in this case. Five federal judges, one of whom had guided the prosecutorial function of the Department of Justice, roundly

rejected the government's prosecutorial adventurism. But the Justice Department doggedly pressed on, and finally found a receptive judicial ear in Richmond. Driven by the presumption that the exemption must be narrowly construed, the Fourth Circuit has not only exposed petitioners to prosecution, but it has opened the door to any future prosecutions that the Government may bring in the Fourth Circuit. The decision below neglects the principle of international comity embodied in the antitrust exemptions and in this Court's decision in *Hoffman-LaRoche*. In order to resolve the conflict among the circuits, to restore comity in ongoing bilateral relationships, and to prevent future conflicts between the U.S. and foreign antitrust laws, the petition for certiorari should be granted.

A. The Court of Appeals' Decision Creates A Clear Circuit Conflict.

The Fourth Circuit's decision creates a square conflict with that of the Ninth Circuit. Both *Tucor* and this case addressed identical conduct: an agreement with the purpose and effect of protecting foreign shipping agents by raising the price paid to move U.S. military household goods between a foreign country and the United States. In both cases, the foreign inland agents sought to use their market power to induce the prime contractors, the freight forwarders, to raise the bids submitted to the MTMC. *Compare Tucor*, 189 F.3d at 838 (rejecting the Government's argument that "the conduct alleged in the indictment was not 'through transportation'"), *with* App. 11a-12a ("defendants fixed bids for through transportation rates"). And the question before both the Fourth and Ninth Circuits was whether this activity "concerns" the "foreign inland segment" of the transportation route.

The two circuits, however, answered this question in sharply opposite ways. In *Tucor*, the Ninth Circuit unambiguously held that § 1706(a)(4) "clearly applies to any agreement—without limitation—concerning the foreign

inland segment of through transportation." 189 F.3d at 837. The court rejected the United States' attempt to construe the exemption narrowly, holding that the conduct charged in the indictment—"agreeing to eliminate the low prices bid by freight forwarders to the Government and to cause freight forwarders to cancel their low rates," App. 42a; *see also Tucor*, 189 F.3d at 837 (citing *Tucor* Indictment)—fell squarely within the scope of § 1706(a)(4).

By contrast, the Fourth Circuit held that precisely the same activity fell *outside* § 1706(a)(4). App. 11a. According to the Fourth Circuit, the conduct was aimed "at the entire through transportation market, rather than *just* the foreign inland segment," App. 11a-12a (emphasis added), because petitioners sought to raise their profits as subcontractors by inducing the prime contractor to place a higher bid.

Although the facts in *Tucor* and here were materially identical, the Fourth Circuit refused to acknowledge its break with the Ninth Circuit. Instead, it stated it had no occasion to decide whether *Tucor* was correct because, the *Tucor* defendants' conduct was allegedly confined to a foreign country, while here petitioners "took additional steps to perfect their bid-rigging plan" by communicating the German agents' agreement to the freight forwarders in an effort to get them to withdraw, or not match, the initial low bid for the overall transportation route. App. 12a.

In truth, the distinction identified by the Fourth Circuit does not exist. In *Tucor*, the defendants also sought to "cause freight forwarders to cancel their low rates" submitted to MTMC for through transportation. App. 42a. The alleged conspiracies were virtually identical: in both cases, the subcontracting foreign agents reached an agreement among themselves to raise the prices that they receive by the only means possible, by inducing the freight

forwarders to raise the final bids approved by the MTMC.[5] And of course, the United States brought criminal charges solely because of the direct and foreseeable impact that the defendants' conduct was alleged to have on the through rate—the only price that the United States pays for shipping services.

The United States itself argued in *Tucor* that the defendants entered into "a price-fixing agreement whose purpose and effect were to force the United States government to pay supra-competitive prices to move U.S. Servicemen's household goods between the United States and the Philippines." Reply Br. for U.S. at 1, 189 F.3d 834 (9th Cir. 1999) (No. 98-10316) (available at 1999 WL 33612244, at *1). Similarly, the Government recognized in *Tucor* that the conspirators' "conduct, though involving motor carriers located in the Philippines[,] ***target[ed] only the United States***." *Id.* at *1-2 (emphasis added). Thus,

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[5] The only difference in fact was that in *Tucor*, the foreign agents collectively agreed to do business with two freight forwarders, thus "caus[ing] all but the two forwarders with the highest rates on file to cancel their rates with DoD." Br. for U.S. at 5, 189 F.3d 834 (9th Cir. 1999) (No. 98-10316) (available at 1999 WL 33607721, at *5). By contrast, here, the foreign agents informed the freight forwarders that they would do business only with carriers who placed bids at the second-lowest rate, and therefore the low bidder, FF-1, replaced its original bid with a new bid at the second-lowest rate. App. 30a-32a. Both sets of agreements, however, necessarily involved the foreign agents communicating their agreements to freight forwarders in the United States and inducing the freight forwarders to withdraw or cancel the lowest through rates on file. Thus, contrary to the Fourth Circuit's conclusion, both "concern" the "foreign inland segment" and the "through rate" in the exact same way.

there can be no serious argument that the conspiracy found by the Fourth Circuit had any different relation to the overall through rate than that considered by the Ninth Circuit in *Tucor*.

Indeed, as the Statement of Facts demonstrates, those additional steps flow directly from what is the crux of the alleged conspiracy (just as in *Tucor*): an agreement among local German agents (including Gosselin's subsidiary) to boycott any freight forwarder who matched FF-1's low rate, in order to ensure that other freight forwarders would not bid a low rate and then compel the local German agents to reduce their own rates for the foreign inland segment. *See* App. 30a-32a, 62a-63a. The foreign inland segment is only one segment of the through transportation, and when freight forwarders submit bids to MTMC, their bids must cover the costs for all segments (some of which, such as the ocean transport rate, are fixed by a conference of ocean carriers). A low bid for the entire through transportation route thus would reduce the rate that service providers on the foreign inland segment could charge. Petitioners, as general agents, were engaged in the business of negotiating the rate for foreign services with freight forwarders, and Gosselin itself performed local services. App. 60a. Thus, their interests arose out of the foreign inland segment.

The so-called "additional steps" that petitioners took were nothing more than steps to ensure that local German agents could maintain the rates they were charging for the foreign inland segment. Those steps included informing freight forwarders about the local German agents' agreement, and securing from freight forwarders an agreement to file bids at or above the second lowest rate, App. 17a. The Fourth Circuit suggested that these steps reflected "defendants' desire that FF1 withdraw the prime through rate bid it had filed with MTMC," but petitioners, like the defendants in *Tucor*, were only interested in such an action insofar as it would lead to a higher rate for the foreign inland segment. Were the prime rate not withdrawn, the

local German agents' agreement would have been meaningless, because the business available from freight forwarders would likewise have been at the prime rate.

The Fourth Circuit's attempt to distinguish *Tucor* is thus unavailing. Having lost in the Ninth Circuit, the United States did attempt to do one thing differently in the second prosecution: The information here charges the freight forwarders as unindicted "co-conspirators" that "agreed" to file higher through rates, whereas the *Tucor* indictment describes the freight forwarders as the "victims" of the conspiracy. But neither the Fourth Circuit nor the Government has explained how this distinction makes any legal difference. The underlying economic conduct is precisely the same: an agreement among local providers to ensure that the shipping contracts go to freight forwarders who bid at higher through transportation rates so as to ensure a higher foreign service rate.

Because, as this case demonstrates, the United States may choose the forum in which to bring a criminal indictment, there will be little, if any, opportunity for another circuit to weigh in on the scope of the exemption and the shipping community will remain subject to the liability standard of the Fourth Circuit. Add to that the likelihood that most of the charged companies will quickly settle with the Government, and this case presents the best (if not the only) vehicle in which to impose uniformity among the circuits and to vindicate the congressional purpose in crafting an exemption here to limit the extraterritorial reach of the antitrust laws.

B. The Court of Appeals' Decision Misconstrues the Shipping Act Exemption.

The decision below not only creates a clear split with the Ninth Circuit, but it stands foursquare on the wrong side of that split. Section 1706(a)(4) grants immunity to "any agreement or activity concerning the foreign inland segment

of through transportation." The charged conspiracy was initiated by local German agents worried about the price pressure from the initial through rates, and it was those agents' market pressure that forced freight forwarders to withdraw the prime through rates. Under any reasonable construction of the statute, petitioners' participation in formulating these agreements and communicating them to freight forwarders "concerned" the "foreign inland segment" of through transportation.

The Fourth Circuit, however, held that petitioners could be held criminally liable because their conduct concerned more than simply the inland segment. That was error. Section 1706(a)(4) does not require that the charged activities *solely* concern the foreign inland segment. Indeed, Congress specifically removed such language from an earlier draft of the exemption. *See* S. 1593, 97th Cong. § 8(a), at 15 (1981). The Fourth Circuit's contrary position departs from this text and history, and asserts U.S. jurisdiction over conduct that Congress intended to leave in the hands of foreign regulators.

1. The Fourth Circuit Misapplied The Rules Of Statutory Construction.

Because the Shipping Act exemption is clear, the Fourth Circuit needed to look no further than the words of the statute. Yet the Court of Appeals began its analysis on the wrong foot by starting with the interpretive premise that "exemptions from antitrust laws" should be "narrowly" construed. App. 8a. This Court has articulated that canon of construction in *civil* cases concerning *domestic* conduct. But the setting here is dramatically different, because the government prosecution runs into two competing canons with a far greater claim to application: (1) the Court "ordinarily construes ambiguous statutes to avoid unreasonable interferences with the sovereign authority of other nations," *Hoffman-LaRoche*, 124 S. Ct. at 2366, and (2) the Court "traditionally exercise[s] restraint in assessing

the reach of a federal criminal statute," *Arthur Andersen LLP v. United States*, 125 S. Ct. 2129, 2134 (2005) (internal quotations omitted). The Court of Appeals ignored both canons and, in so doing, extended the antitrust canon into an area in which it did not belong.

a. This Court has "construed the reach of exemptions from antitrust laws narrowly" on the ground that "robust marketplace competition" reflects a "'fundamental national economic policy.'" App. 8a (quoting *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 218 (1966)). This salutary principle has little application, however, where the conduct at issue occurs primarily in a foreign nation and thus implicates not our "national economic policy," but the economic policy of a foreign sovereign.

Indeed, *Hoffman-LaRoche* makes this point crystal clear. In that case, the Court was called on to interpret an ambiguous provision of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), which excluded from the antitrust laws foreign anticompetitive conduct, except where the conduct had a "substantial" effect on domestic commerce that would give rise to a domestic Sherman Act claim. 124 S. Ct. at 2363. The plaintiffs in that case were foreign citizens who sought to recover under the U.S. antitrust laws based on a price-fixing conspiracy that raised vitamin prices in their countries, as well as in the United States.

In the course of interpreting the FTAIA's exemption to the antitrust laws, this Court at no time invoked the principle of narrow construction that the Fourth Circuit found so persuasive here. To the contrary, every member of the Court agreed that the controlling canon of interpretation rose from the need to respect international comity. *See Hoffman-LaRoche*, 124 S. Ct. at 2366 (citing the need to "construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations"); *id.* at 2373 (Scalia, J., with Thomas, J., concurring in judgment) ("[S]tatutes

should be read in accord with the customary deference to the application of foreign countries' laws within their own territories.").

As the Court explained, the reason for this canon is clear:

> This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world.

Id. at 2366. In addition to relying on the presumption to resolve the statutory ambiguity, the Court noted that the FTAIA's "language and history" suggested that the statute was intended "to clarify, perhaps to limit, but not *to expand* in any significant way," the Sherman Act's scope. *Id.* at 2369. Therefore, the fact that the Court was construing a specific exemption counseled against reading the antitrust laws to apply to conduct that had not previously been recognized as falling within the statute's reach.

Just as the Court applied this rule in *Hoffman-La Roche*, the Fourth Circuit should have applied it here. In crafting the antitrust exemption to the Shipping Act, Congress broadly intended to exclude from the U.S. antitrust laws "any agreement or activity concerning the foreign inland segment of through transportation that is part" of the U.S. import or export trade. 46 U.S.C. app. § 1706(a)(4). As both the text and history make clear, the very purpose of that amendment was to prevent U.S. law from "wrongfully invad[ing] the jurisdiction of trading partner sovereigns." *Tucor*, 35 F. Supp. 2d at 1182 (quoting *1981 Shipping Act Hearing*, *supra*).

Therefore, as in *Hoffman-LaRoche*, this is not just a case where "principles of prescriptive comity counsel against the Court of Appeals' interpretation." 124 S. Ct. at 2369. This is a case where the text and the history of the statute make clear that Congress itself enacted the measure out of respect for the very principles identified by the canon of construction. The conduct at issue is fully subject to the review and enforcement activities of the German antitrust authorities, which as discussed below, have already taken action based on the facts in this case. The Court of Appeals erred by applying a principle of "narrow construction" instead of the canon of construction articulated by *Hoffman-LaRoche*.

b. In addition to neglecting important comity concerns, the Court of Appeals erred by neglecting the principle that criminal statutes should be narrowly construed. As this Court explained just last Term:

> We have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, and out of concern that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed."

Arthur Andersen, 125 S. Ct. at 2134 (quoting *United States v. Aguilar*, 515 U.S. 593, 600 (1995)) (other internal quotations omitted). The Court of Appeals should have given this principle full application, particularly where, as here, petitioners did not merely rely on a reasonable reading of the statute; they relied on *Tucor*, the only Court of Appeals decision on the books at the time of the conduct.

The Fourth Circuit, however, held that the principle that antitrust exemptions should be narrowly construed trumped any concern for restraint on the criminal prosecution. *See*

App. 8a. Not one of the seven cases cited by that court, however, concerned the application of that rule to a criminal prosecution. *See Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231-32 (1979); *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 732-33 (1973); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 218 (1966); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309 (1956); *United States v. Borden Co.*, 308 U.S. 188, 198-200 (1939). All but one involved civil actions under the antitrust laws, and the only criminal case cited, *Borden*, did not hold that congressionally created exemptions should be narrowly construed against a criminal defendant.[6] Insofar as petitioners are aware, the criminal prosecution in this case is the first one on record in which the Government has chosen to bring a criminal prosecution, rather than a civil action, against individuals who had relied on an interpretation of the statute supported by federal court precedent. Such a prosecution runs directly contrary to the rule of construction applied in *Arthur Andersen*, *Aguilar*, and many other cases, requiring that criminal defendants be given "fair warning" of the illegality of their activities.

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[6] In the portion of the opinion cited by the Fourth Circuit, defendants argued that, although their conduct ran afoul of the antitrust laws, immunity should be *implied* based on obligations under a parallel federal regulatory regime. This Court rejected that argument recognizing that "repeals by implication are not favored." *Borden*, 308 U.S. at 198. *Borden* considered an express antitrust exemption later in the opinion, but it did not invoke any principle of construction, because the express exemption—which required participation in government-led industry mediations—clearly did not apply to the wholly private conduct at issue. *See id.* at 201.

The Fourth Circuit held that the "traditional tools of statutory construction" had removed any statutory ambiguity from the exemption, and therefore, there was no cause to resort to the rule of narrow construction articulated in *Arthur Andersen* and underlying the parallel "rule of lenity." *E.g.*, *Rewis v. United States*, 401 U.S. 808, 812 (1971). There is nothing "traditional" about narrowly construing an antitrust exemption to criminalize arguably legal conduct. For the reasons explained above, the text, history, and applicable canons of construction run precisely in the other direction. The Court of Appeals' contrary conclusion was erroneous and warrants this Court's review.

2. The Decision Ignores The Plain Language Of The Exemption.

Relying on a misleading rule of construction, the Court of Appeals misread the statute. As the Fourth Circuit recognized, the statutory question is whether petitioners' conduct constituted "agreement or activity" "concerning" the "foreign inland segment of through transportation." The Fourth Circuit, however, refused to give this term its natural meaning and instead ruled that the agreements must *either* concern the "foreign inland segment" or the entire transportation route. That is a false choice. As a matter of logic and law, an agreement can "concern" *both* the broader through market and the inland submarket; given the facts of this case, there can be no question that petitioners' activity did concern the foreign inland segment.

a. The statutory question begins with the plain meaning of the statute. *E.g.*, *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989); *Perrin v. United States*, 444 U.S. 37, 42 (1979). The dictionary defines "concern" to mean "to relate to" or "to be about." Webster's Third New Int'l Dictionary 470 (1981). This Court similarly has recognized that there are many ways in which one thing may "relate to" another. The term is "highly general," and the Court has "interpreted it broadly." *Barnett Bank of Marion*

County, N.A. v. Nelson, 517 U.S. 25, 38 (1996); *see also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987) (words "relate to" have "broad common-sense meaning") (internal quotation omitted).

Petitioners' conduct thus can be said to "concern" the foreign inland segment if it "relates" in some meaningful way to that segment. The Fourth Circuit accepted petitioners' argument that "[t]he first step in this scheme ... was the agreement with twelve large German local agents to handle no business from forwarders who filed bids below the second level," and the court also accepted that "the success" of the scheme "depended entirely on the viability of the arrangement defendants had reached with the local German firms." App. 11a. That should have been enough.

Despite this correct premise, the court reached the wrong conclusion: that petitioners' conduct did not "concern" the foreign inland segment, because petitioners took the "additional step" of communicating the German agents' agreement to freight forwarders responsible for bidding on the through transportation contract. That "additional step," however, was hardly something separate from the original agreement. Rather, given that the German agents were subcontractors of the freight forwarders, the German agents could not have effectuated the agreement without communicating that information to those who were actually placing the bid.

The Court of Appeals held that "[b]ecause defendants' collusive effort was aimed at the entire through transportation market, rather than *just* the foreign inland segment, we do not think that they can claim exemption for antitrust liability ...." *Id.* (emphasis added). There is no requirement, however, that the agreements subject to § 1706(a)(4) be targeted at *just*, or *solely*, the foreign inland segment.

b. The Fourth Circuit decision imports an additional limitation into the statute: the requirement that an agreement

"solely" concern the "foreign inland segment" before a carrier may be entitled to immunity. That restriction is not only contrary to the plain words of the statute, but is belied by the drafting history of the statute itself. As the district court recognized in *Tucor*, the original draft of § 1706(a)(4) provided immunity to "any agreement or activity that relates *solely* to transportation services between foreign countries." *See* S. 1593, 97th Cong. § 8(a)(3) (1981) (emphasis added); *see also Tucor*, 35 F. Supp. 2d at 1182 (quoting bill).

At the hearing on the bill, however, a representative of the foreign shipping industry expressed concern that "the word 'solely' ... could be construed, for example, as excluding from the intended antitrust law exemption arrangements by conferences or ocean carriers for inland *foreign* motor, rail or air transportation in connection with intermodal routes and services." *1981 Shipping Act: Hearing Before Subcomm. on Merchant Marine of the Senate Comm. on Commerce, Science and Transp.* ("*1981 Shipping Act Hearing*"), 97th Cong. 208 (1981) (statement of Dr. Henry De La Trobe, Vice Chairman, Council of European and Japanese Nat'l Shipowners Ass'n).

Following this testimony, the bill was reported out of committee with the "solely" limitation removed. The new draft extended the antitrust exemption to "any agreement or activity concerning the inland portion of any intermodal movement occurring outside the United States through part of transportation provided in a United States import or export trade." *See* S. 1593, 97th Cong. § 8(a)(7) (1981). It was that language, with only slight modifications, that became § 1706(a)(4) in the final statute. The Fourth Circuit's attempt to re-import the "solely" limitation back into the statute thus stands at odds not only with the plain text, but also with the drafting history of the statute itself.

The Fourth Circuit reached the conclusion that it did because it believed a contrary reading "would threaten to excise antitrust liability from the through transportation

market completely, because "any firm operating in any segment of any through transportation channel need only execute an agreement with a local moving agent to shield itself from the antitrust laws entirely." App. 13a. That policy rationale reflects a fundamental misunderstanding of the Shipping Act itself, because the exemption for the foreign inland segment is not an isolated exception. Rather, antitrust exemptions already apply to every other segment of the transportation of household military goods.

In addition to the foreign inland segment, the foreign port rates are exempt from the antitrust laws under section 7(a)(5); the ocean transportation rates (which are set collectively by conferences of United States-flag vessels) are exempt under sections 7(a)(1) and (a)(2); the U.S. port rates are exempt under sections 7(a)(1) and (a)(2); and the fifth component, the prices for domestic trucking are exempt under 49 U.S.C. §§ 13703(a)(1) and (a)(6). Congress exempted from the antitrust laws these components of through transportation on the one hand to limit the intrusion of U.S. law into foreign jurisdictions and on the other to leave the domestic components subject to the jurisdiction of the Federal Maritime Commission.[7]

Thus, the Fourth Circuit's cramped reading of the statutory text is hardly necessary to prevent the shipping

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[7] *See, e.g.*, H.R. Rep. No. 98-53, pt. 1 at 3, 12 (1983) ("[T]he Committee intends that violations of this Act not result in the creation of parallel jurisdiction over persons or matters which are subject to the Shipping Act of 1983."); S. Rep. No. 97-414, at 26, 34 (1982) ("Thus, the antitrust laws will have no place with respect to activities and agreements authorized or prohibited under this bill. The Shipping Act exclusively, as administered by the [FMC], will prescribe the rules, protections, and sanctions necessary to regulate international shipping effectively.")

industry from taking advantage of a limited statutory loophole. Rather, the interpretation effectively undermines Congress's intention to leave the antitrust laws outside of an area already subject to the regulation of foreign jurisdictions and the Federal Maritime Commission.

C. The Question Presented In This Case Is Far-Reaching And Of Exceptional Importance.

The petition for certiorari also should be granted because this case presents an issue of exceptional importance regarding the scope of U.S. antitrust laws in today's global economy. As in *Hoffman-LaRoche*, the Court of Appeals has extended the reach of federal antitrust jurisdiction into areas properly subject to the jurisdiction of foreign sovereigns. The decision is of particular concern to the international shipping industry, because it permits the future prosecution of the foreign shipping agents who carry the household goods of our servicemen stationed abroad. More broadly, the decision ignores the principle of prescriptive comity and thus invites the narrow construction of other congressionally imposed limits that are necessary to avoid conflict in "today's highly interdependent commercial world." *Hoffman-LaRoche*, 124 S. Ct. at 2366.

Indeed, the question of foreign jurisdiction is not simply a theoretical one; the German government is currently investigating the conduct at issue here, and it has already made preliminary findings under its own antitrust laws. On November 15, 2004, the Bundeskartellamt, the Federal Cartel Office, issued an Interim Decision dismissing its action against Gosselin's director, Mark Smet, but electing to continue antitrust proceedings against Gosselin and another shipping agent for price-fixing and incitement to boycott. The Cartel Office has not issued a final decision, but the Interim Decision states that the office expects to impose a fine on Gosselin in the range of €2,500,000.

The German government's demonstrated ability to regulate conduct within its own borders evidences Congress' wisdom in limiting the reach of the U.S. antitrust laws. This is the precise consideration that has led this Court to recognize that U.S. laws should be interpreted to avoid that conflict. Because European and other countries have fashioned comprehensive antitrust regimes, extending the reach of U.S. antitrust law infringes the sovereign prerogatives of foreign nations to regulate their own markets according to their own laws and policies.

As this Court recognized in *Hoffman-LaRoche*, the prospect of parallel antitrust enforcement actions invites the potential for interference with the sovereign prerogatives of foreign governments. This Court rejected the proposition that "the practical likelihood of interference with the relevant interests of other nations is minimal," recognizing that the Court has already heard cases "to the contrary," *Hoffman-LaRoche*, 124 S. Ct. at 2368, such as *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 797-99 (1993), where "the alleged conduct in the London reinsurance market, while illegal under United States antitrust laws, was assumed to be perfectly consistent with British law and policy," *Hoffman-LaRoche*, 124 S. Ct. at 2368; *see also* 2 W. Fugate, *Foreign Commerce and the Antitrust Laws* § 16.6 (5th ed. 1996) (noting differences between European Union and United States law on vertical restraints)

Likewise, "even where nations agree about primary conduct, say price fixing, they disagree dramatically about appropriate remedies." *Hoffman-LaRoche*, 124 S. Ct. at 2368. "The application, for example, of American private treble-damages remedies to anticompetitive conduct taking place abroad has generated considerable controversy." *Id.* Similarly here, the United States has chosen to bring a criminal prosecution against the petitioners and the country has arrested Gosselin's chief executive, a Belgian citizen, when he traveled to a conference in the United States. By contrast, the German proceeding is conducted by an

administrative agency, and it is a quasi-punitive process, without the stigma of criminal liability or the prospect of imprisonment for any charged individuals.

The Fourth Circuit decision not only creates the prospect for interference with German policy in this case, but if left undisturbed, invites conflict in future antitrust cases. The Fourth Circuit's determination to construe antitrust exemptions "narrowly," and to ignore the principle of prescriptive comity, invites a similar construction of other antitrust exemptions in future cases. In order to reaffirm *Hoffman-LaRoche* and prevent future interference, certiorari is warranted.

D. The Court Should Also Grant Review On The Fraud Count In The Indictment, Because This Claim Falls With The Antitrust Charge.

The petition for certiorari should be granted as to the entire case so that the judgment may be vacated with respect to the second charge in the indictment: the charge that petitioners engaged in a conspiracy to defraud. *See* 18 U.S.C. § 371. The indictment alleges no separate theory of fraud in this case. The Statement of Facts says, summarily, that petitioners "did unlawfully, willfully and knowingly combine, conspire and agree to defraud the United States by increasing the rates paid by DOD for the transportation of military household goods." App. 67a. If petitioners' conduct was protected by Shipping Act antitrust immunity, then there is no unlawful conduct alleged in this case, because there is no allegation of any separate fraudulent or misleading statements made by the petitioners. Thus, it is impossible to understand the conduct on which any charge of fraud could be based.

The Fourth Circuit, holding that there was no immunity, did not address this issue. *See* App. 20a-21a. In order to ensure that this issue is preserved after any remand of the case, the grant of certiorari should include this dependent

issue as well, so that, at the least, it would be available for decision by the Fourth Circuit after this Court's disposition of the other issues in the case.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari.*

Respectfully submitted,

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APPENDIX

CONTENTS

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES of America,
Plaintiff-Appellant,
v.
GOSSELIN WORLD WIDE MOVING, N.V.;
The Pasha Group,
Defendants-Appellees.

United States of America,
Plaintiff-Appellee,
v.
Gosselin World Wide Moving, N.V.,
Defendant-Appellant,
and
The Pasha Group,
Defendant.

United States of America,
Plaintiff-Appellee,
v.
The Pasha Group,
Defendant-Appellant,
and
Gosselin World Wide Moving, N.V.,
Defendant.

Nos. 04-4752, 04-4876, 04-4877.

Argued March 18, 2005
Decided June 14, 2005

Before WILKINSON and GREGORY, Circuit Judges, and FREDERICK P. STAMP, JR., United States District Judge for the Northern District of West Virginia, sitting by designation.

Affirmed in part, reversed in part, and remanded for resentencing by published opinion. Judge WILKINSON wrote the opinion, in which Judge GREGORY and Judge STAMP joined.

OPINION

WILKINSON, Circuit Judge.

In this case, we must decide whether defendants are criminally liable for a scheme that raised the prices the Department of Defense ("DOD") pays to transport its personnel's belongings overseas. Defendants have admitted to orchestrating this scheme and have agreed to accept liability under the Sherman Act, 15 U.S.C. § 1 (2000), and the federal anti-fraud statute, 18 U.S.C. § 371 (2000), if we determine that their behavior is not immune from such liability under the Shipping Act, 46 U.S.C. app. §§ 1701-1719 (2000). We hold that the Shipping Act's immunity provisions afford defendants no relief from liability for the antitrust violation and conspiracy to defraud they have admitted. We therefore affirm in part, reverse in part, and remand for resentencing.

I.

A.

When personnel of the DOD are posted to foreign countries, the International Through Government Bill of Lading program ("ITGBL") covers their moving expenses. The DOD contracts with private companies to provide this service. Under the Military Traffic Management Command

("MTMC"), bids are solicited for "through rates" from U.S. freight forwarding companies. A through rate is a payment encompassing all the costs involved in a door-to-door move of DOD personnel's household effects. Bidding for through rates occurs biannually and involves a two step process.

In the first step, or "initial filing," the freight forwarders file a bid for a through rate associated with a particular route, or channel. The low bid that emerges is referred to as the "prime through rate." MTMC publishes this bid and the next four lowest bids. The company that bids the prime is entitled to a set percentage of DOD freight business for the associated channel.

In the second step, other freight forwarders resubmit bids in light of the published prime. The remaining companies may match, or "me-too," the prime for each channel, or they may bid a higher rate. When the channel at issue operates in a competitive market, a forwarder must typically me-too the prime to receive any DOD business. Forwarders that me-too the prime are also entitled to a set portion of DOD business for the cycle and channel for which they have bid.

Because through rates are unitary, they encompass many costs, all of which the U.S. forwarders become responsible for when the DOD accepts their bids. Some of these costs relate to moving services undertaken by other firms along the channel. Costs of this sort cover five general categories of service: the carriage of goods between inland U.S. cities and U.S. ports, services performed at U.S. ports, ocean transportation between U.S. and foreign ports, foreign port services, and carriage of goods between foreign ports and foreign inland points. U.S. freight forwarders must naturally consider these costs in setting their bids.

B.

Defendant Gosselin World Wide Moving N.V. ("Gosselin"), a Belgian corporation, and defendant The Pasha Group ("Pasha"), a U.S. corporation, operate in the channels between the United States and Germany. Both companies provide a package covering local German moving agent services, European port services, and ocean transport services in this market. Defendants thus deal with goods shipments between German points of origin (the households of DOD personnel abroad) and U.S. ports of destination. Gosselin and Pasha offer a "landed rate," which is a fee that covers all the moving costs involved in the portion of the channels they service.

Defendants also act as the exclusive agents of the International Shippers' Association ("ISA"), a conference of freight forwarders organized to negotiate collectively with shippers operating in the through transportation market. Many of the U.S. freight forwarders who place bids in the MTMC are also ISA members. In their capacity as ISA agents, Gosselin and Pasha negotiate service contracts with the Trans Atlantic American Flag Line Operators ("TAAFLO"), a group of U.S. ocean carriers. TAAFLO's service contract with the ISA entitles all ISA members to ocean transportation with TAAFLO member-carriers at a predetermined rate.

In late 2001, initial filings for the summer bidding cycle of 2002 occurred. A U.S. freight forwarder ("FF1") filed prime through rates with the MTMC for twenty-six of the channels between Germany and the U.S. FF1 did not use the landed rate offered by either defendant. Instead, by negotiating separately with each service provider at every step of the transportation chain, FF1 was able to undercut its competitors by three dollars per hundredweight in twelve of the twenty-six channels. In December 2001, DOD published

FF1's prime bid along with the next four lowest. The remaining forwarders then had until January 12, 2002 to file their second round bids.

Gosselin was evidently alarmed that FF1 had been able to low-bid for the twelve channels without using Gosselin's landed rate. Later in December, Gosselin's managing director sent an email to another landed rate provider, inviting the provider to collude with Gosselin to prevent the me-too rates for the twelve routes at issue from converging to the prime. Such convergence was likely, as we have noted, because of the competitiveness of the US-Germany through transportation market. The Gosselin managing director observed that by "not taking [FF1's bid] into consideration we would increase the rate level with an average of [$3.63]." The director opined that "[t]his is the only thing that in my mind can happen." In a reply email sent the same day, an executive at the competitor concurred, noting that "if we do not react and give [the] industry a clear message which rate to base the [me-too bids] on, then everyone will use the low rate and later expect us to reduce our rates so those carriers can work under their [me-too] rates."

Shortly after this exchange, Gosselin's managing director forwarded the emails to the president of Pasha. The Gosselin executive identified the twelve channels, which had "quite some money on the table," and inquired "what rate levels would you be able to support if those [channels] would go to second level?" The director stressed that "it is important we [ ] move rather quickly now." Pasha later indicated its willingness to cooperate.

Defendants faced a difficult task in preventing the imminent me-too bids from converging to the prime. FF1 had already demonstrated that defendants' landed rates could be undercut by contracting separately for each transportation

segment along the twelve channels. Defendants therefore had to take preemptive action to prevent the remaining U.S. forwarders from following FF1's lead. In early January 2002, the managing director of Gosselin agreed in writing to pay twelve of the largest German moving agents a specified fee. The German agents, for their part, agreed not to handle business from freight forwarders in those channels unless the forwarders submitted me-too bids at the second lowest level (the "second low") or above. Gosselin thereafter arranged a telefax to U.S. freight forwarders who were finalizing their second-step bids advising them of the German agents' undertaking.

Not content with securing their share of the DOD business designated for the second-round bids, defendants set about eliminating FF1's prime rate in the twelve channels at issue. First, they persuaded FF1 to cancel its bid with the MTMC if the remaining freight forwarders would file second-step bids at or above the second-low level. Defendants then secured such an agreement from the remaining forwarders. The forwarders overwhelmingly honored this agreement, and those who strayed below the second-low level were persuaded to withdraw their competitive bids.

As a result of defendants' scheme, a good deal of household goods shipments during the 2002 summer cycle in the twelve channels occurred at or above the second-low rate. The net financial effect of the conspiracy was to cause the DOD to pay substantially more than if FF1's original prime rate had prevailed.

C.

The Department of Justice ("DOJ") charged defendants by information with two counts. The first count alleged a conspiracy to restrain trade in violation of the

Sherman Act. 15 U.S.C. § 1 (2000). The second count alleged a conspiracy to defraud the United States under 18 U.S.C. § 371 (2000).

Defendants agreed to conditional pleas. They stipulated to a statement of facts on the basis of which they would move the district court to dismiss both counts. Gosselin and Pasha agreed in their pleas to make only one argument in support of their motion to dismiss: that the conduct set forth in the statement of facts "is immune from prosecution under the [Shipping Act.]" If the district court found such immunity with respect to "both counts," and this finding was affirmed on appeal, defendants would not enter a guilty plea. If the district court denied the motion "as to either or both counts," however, the defendant would plead guilty on the "remaining counts" subject to withdrawal if a higher court overturned the district court's finding. The plea agreements also indicated that the parties would recommend to the district court specified sentences in the form of financial penalties depending on which count or counts survived the motion to dismiss.

Pursuant to the plea agreement, defendants filed a motion to dismiss on the basis of immunity under the Shipping Act, 46 U.S.C. app. §§ 1701-1719 (2000). The district court granted the motion with respect to the antitrust count, but denied it with respect to the conspiracy to defraud count. Following the arrangement set out in the plea agreements, Gosselin and Pasha pled guilty to the conspiracy to defraud count. Again pursuant to the pleas, the district court imposed on each defendant a criminal fine of $4.6 million. After the final sentencing order, the DOJ appealed the dismissal on immunity grounds of the antitrust count and defendants cross-appealed their convictions on the conspiracy to defraud count. We now address these appeals, beginning with the issue of immunity under the Shipping Act.

II.

Defendants' collusion with each other and with other firms operating in the twelve transportation channels clearly violated the Sherman Act's injunction on combinations "in restraint of trade." 15 U.S.C. § 1 (2000). "It has been held too often to require elaboration [ ] that price fixing is contrary to the policy of competition underlying the Sherman Act...." *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309 (1956). Defendants' scheme, which prevented second round bids from converging to the prime and even erased FFI's first round prime bid, amounted to naked bid rigging. And "bid rigging agreement is price-fixing agreement of the simplest kind." *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 318 (4th Cir.1982) (quoting *United States v. Bensinger Co.*, 430 F.2d 584, 589 (8th Cir.1970)); *see also United States v. W.F. Brinkley & Son Const. Co., Inc.*, 783 F.2d 1157, 1160 (4th Cir.1986). Criminal antitrust liability is therefore appropriate unless defendants enjoy immunity under another federal law.

The Supreme Court has consistently construed the reach of exemptions from antitrust laws narrowly, even when Congress confers these exemptions in terms. *See, e.g., Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982). This narrow construction of antitrust immunity is appropriate because the robust marketplace competition that antitrust laws protect is a "fundamental national economic policy." *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 218 (1966); *see also Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973). This canon of construction has been employed by the Supreme Court to defeat antitrust exemptions claimed under provisions of the McCarran-Ferguson Act, *see Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231-32 (1979), the Miller-Tydings and McGuire Acts, *see McKesson*, 351 U.S. at 316, and the

Agricultural Marketing Agreement Act, *see United States v. Borden Co.*, 308 U.S. 188, 198-200 (1939).

Defendants here claim exemption from antitrust law under a federal maritime statute, the Shipping Act of 1984. 46 U.S.C. app. §§ 1701-1719 (2000). The Act modified an earlier law enacted in 1916. *See* 46 U.S.C. app. §§ 801-842 (1982). The earlier enactment grew out of the difficulties faced by the U.S. shipping industry in the early part of the last century. *See generally Puerto Rico Ports Auth. v. FMC*, 919 F.2d 799, 806-807 (1st Cir. 1990); *Plaquemines Port, Harbor and Terminal Dist. v. FMC*, 838 F.2d 536, 542-43 (D.C. Cir.1988). To set U.S. shippers on an equal footing with foreign competitors, who operated outside of U.S. antitrust strictures, Congress granted them limited antitrust immunity. *See* 46 U.S.C. app. § 814 (1982).

This immunity, however, came with regulatory strings attached. *See id.* § 804. The regulatory requirements of the 1916 Act were designed to prevent the maritime transportation industry from monopolistically abusing its newly conferred grant of immunity. *See Puerto Rico Ports*, 919 F.2d at 807. Regulation under the 1916 Act thus preserved some anti-competitive prohibitions. *See id.*; *A & E Pacific Const. Co. v. Saipan Stevedore Co., Inc.*, 888 F.2d 68, 71 (9th Cir.1989); *Plaquemines*, 838 F.2d at 542-43. Nonetheless, regulated firms did enjoy the real benefit of operating outside the full strictures of federal antitrust laws. Mindful of this benefit, the Supreme Court concluded that the traditional canon of narrow construction, applicable to antitrust exemptions generally, applied with full force to the coverage provisions of the 1916 Act. *See FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 732-33 (1973); *Carnation*, 383 U.S. at 217-218.

The 1916 Act was supplemented by the Shipping Act of 1984, 46 U.S.C. app. §§ 1701-1719 (2000). Although the

1984 Act contained several new grants of antitrust immunity, *see id.* § 1706(a), nowhere in the 1984 Act did Congress indicate an intention to override the principle of narrow construction for antitrust exemptions that the Supreme Court had long applied to the 1916 Act. Moreover, this interpretive maxim has informed the construction of every other grant of antitrust immunity in federal legislation. We therefore see no reason to depart from ordinary practice in construing the 1984 Act.

III.

With the foregoing interpretive framework in mind, we turn to defendants' particular contentions. The district court found antitrust immunity for Gosselin and Pasha in three distinct statutory provisions of the Shipping Act. We address immunity under each statutory provision separately.[1]

A.

Defendants first claim immunity under 46 U.S.C. app. § 1706(a)(4) (2000), which exempts from antitrust liability "any agreement or activity concerning the foreign land segment of through transportation that is part of transportation provided in a United States import or export trade."

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[1] Defendants note that when parties enter into a conditional plea agreement designed to permit defendants to challenge the prosecution theory on a particular basis, any ambiguities in the stipulated facts must be resolved in defendants' favor and the government may not rely in its prosecution on facts beyond those stipulated. *See United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986). Accordingly, in resolving the contentions that defendants press on appeal, we take care not to rely on allegations that were not admitted in the plea agreements and the incorporated statement of facts.

Defendants argue that this provision covers all aspects of their scheme to rig bids. The first step in this scheme, defendants emphasize, was the agreement with twelve large German local agents to handle no business from forwarders who filed bids below the second low level. This agreement, defendants claim, is covered by § 1706(a)(4) because the German agents provide only services between German ports and destinations in the interior--a "foreign inland segment." Gosselin and Pasha had market leverage only in this segment; in the other segment they service, ocean transportation, they were constrained by their status as ISA agents and the strict terms of the TAAFLO service contract. Thus the success of the remainder of their scheme depended entirely on the continued viability of the arrangement defendants had reached with the local German firms. For this reason, defendants conclude, the scheme in its entirety should be covered by the immunity provision of § 1706(a)(4).

We do not believe that the statutory exemption extends as far as Gosselin and Pasha would have it. To begin with, the statutory language does not support defendants' position. For an agreement or activity to "[concern] the foreign inland segment," § 1706(a)(4) (emphasis added), as the statute requires, the parties undertaking the agreement or participating in the activity must have in mind some consequence for the foreign inland segment that they intend their behavior to have. *Accord Hileman v. Pittsburgh & Lake Erie Props., Inc.*, 290 F.3d 516, 519 (3d Cir. 2002) (" '[C]oncerning' ... is essentially a connecting term, the scope and meaning of which is defined in part by the terms it modifies."); *Commerford v. Thompson*, 1 F. 417, 420 (C.C.D. Ky. 1880) (observing that the "broadest sense" of the term " 'concerning' " is " 'pertaining to or relative to' "). Because defendants' collusive effort was aimed at the entire through transportation market, rather than just the foreign inland segment, we do not think that they can claim exemption from antitrust liability under § 1706(a)(4). Indeed, defendants

fixed bids for through transportation rates, *i.e.* door-to-door rates, not just rates for the "foreign inland segment" of the routes. § 1706(a)(4).

It is true that defendants' original agreement with the German local agents may have had the relationship to a "foreign inland segment" that the statute requires. *Id.* Indeed, *United States v. Tucor Int'l, Inc.*, 35 F. Supp. 2d 1172 (N.D. Cal. 1998), *aff'd*, 189 F.3d 834 (9th Cir. 1999), the case upon which Gosselin and Pasha chiefly rely, awarded immunity under the Shipping Act. In *Tucor*, several Philippine firms, operating in a through transportation market "packed, picked up, and trucked household shipments [of U.S. military personnel] from Subic Naval Base and Clark Air Force Base ... to a Philippine seaport." 189 F.3d at 836. The firms were indicted under the Sherman Act for conspiring amongst each other "to suppress competition by fixing prices." *Tucor*, 35 F. Supp. 2d at 1175. Defendants pled guilty, but the district court later dismissed the indictments on the basis of immunity under § 1706(a)(4). The Ninth Circuit affirmed, finding that § 1706(a)(4)'s reference to a "foreign inland segment," "unambiguously exempts the activities of [defendants]," *Tucor*, 189 F.3d at 836, occurring as they did between points "entirely within a foreign country." *Id.* at 835.

There is an argument to be made that the agreement defendants made with the local German firms fits under the immunity announced in *Tucor*. And if defendants' scheme had ended there, we would have to decide whether the agreement did so qualify and whether *Tucor* should be adopted in this circuit. But the scheme did not stop there. Rather, Gosselin and Pasha took additional steps to perfect their bid-rigging plan. And we are not persuaded that these additional steps "[concerned] the foreign inland segment," in the manner the statute requires. § 1706(a)(4).

Gosselin and Pasha's contacts with FF1, for instance, related not to foreign inland services, but to defendants' desire that FF1 withdraw the prime through rate bid it had filed with MTMC. Similarly, the agreement defendants secured from other U.S. freight forwarders to file bids at or above the second low level had little to do with the German inland segment of the through services these forwarders offered. Rather, the agreement was a precommitment mechanism to ensure that none of the freight forwarders defected from the anticompetitive cartel that defendants were assembling. When some of these forwarders later broke ranks, defendants instituted measures to reign them in. But these measures were designed only to secure withdrawal of the competitive through rate bids the forwarders had filed in the second round, not to have consequences for the foreign inland segment.

In short, none of the additional steps Gosselin and Pasha took beyond their agreement with the German local agents had intended effects for any aspect of the German inland part of the through transportation market. It is unclear, therefore, how these steps "[concerned]" this foreign inland segment, as they must for immunity to attach under § 1706(a)(4).

Moreover, a broad immunity of the sort that Gosselin and Pasha seek would threaten to excise antitrust liability from the through transportation market completely. If § 1706(a)(4) exempted from anti-trust all stages of a conspiracy that involves in some manner a foreign inland segment, then any firm operating in any segment of any through transportation channel need only execute an agreement with a local moving agent to shield itself from the antitrust laws entirely. It does not take much to imagine how sophisticated transportation firms, intent on reaping larger gains, might abuse the immunity of such a rule. The incentives for opportunistic associations with companies operating in foreign inland

segments would simply be too great. And without the constraint of anticipated antitrust liability, the prices charged by companies in the through transportation market would escalate. Further, the agreements and activity for which defendants seek immunity here were not regulated by the FMC. Lack of regulatory oversight might only exacerbate the upward pressure on prices for through transportation engendered by the absence of antitrust liability.

The upshot of defendants' interpretation of § 1706(a)(4) would therefore be a through transportation market beset with collusive and artificially inflated bids, detrimental to consumers and non-cooperating competitors alike. The government, as a repeat purchaser, would stand to lose much, and the extra money it would have to pay would come from the fisc and thus taxpayers.

It is unlikely that Congress intended such dismaying effects, but if there is any doubt over whether § 1706(a)(4) affords defendants relief, it is settled by the maxim that exceptions to the antitrust laws should be construed narrowly. *See Seatrain*, 411 U.S. at 732-33. The Supreme Court has relied on this principle to render agreements subject to the antitrust laws rather than the lesser anticompetitive protections of FMC regulation. *See id.* Here defendants seek exemption from legal enforcement by the DOJ for agreements that have not been regulated by the FMC. We hold for reasons earlier expressed that § 1706(a)(4) does not immunize defendants' scheme to raise through rate bids in the twelve channels at issue.

B.

Defendants next claim immunity under § 1706(a)(2). That section exempts from antitrust laws

any activity or agreement within the scope of this chapter ... undertaken or entered into with a reasonable basis to conclude that (A) it is pursuant to an agreement on file with the [FMC] and in effect when the activity took place, or (B) it is exempt[ed by the FMC under § 1715] from any filing or publication requirement of this chapter.

Defendants do not claim that their "activity or agreement[s]" were undertaken "pursuant to an agreement on file with the" FMC. Rather, they point to a tariff filing exemption that the FMC granted to non-vessel operating common carriers, like defendants, for the "[t]ransportation of used military household goods and personal effects by ocean transportation intermediaries." 46 C.F.R. § 520.13(c) (2004). Gosselin and Pasha argue that they reasonably believed their collusive "activit[ies] and agreement[s]" to be exempt from the filing requirements of the Shipping Act under this regulation, and thus beyond the antitrust laws under § 1706(a)(2)(B).

The touchstone of § 1706(a)(2)(B) is reasonableness. Yet the terms of the exemption on which defendants rely, and other features of the regulatory framework in which defendants operate, demonstrate that their reliance was, if anything, unreasonable.

To begin with, the exemption facially covers only "tariffs," *see* 46 C.F.R. § 520.1(a) (2004), not the kind of agreements and activities involved in defendants' bid rigging scheme. Yet a distinction between tariffs on the one hand and operating agreements on the other pervades the Shipping Act. Compare § 1703(a) (cataloguing the "agreements by or among ocean common carriers" to which the "chapter applies," including agreements to "discuss, fix, or regulate transportation rates"), with § 1707 (describing "tariffs" that "each common carrier and conference shall keep open to public inspection"). This statutory distinction makes

implausible defendants' claim that they understood the reference to tariffs in the exemption to cover the collusive agreements they secured during the course of their scheme.[2]

The terms of § 1715, the Shipping Act provision mentioned in § 1706(a)(2)(B) which governs the FMC's exemption procedures, further erodes Gosselin and Pasha's claim of immunity under § 1706(a)(2)(B). Section 1715 conditions exemption from the disclosure requirements of the Act on a finding by the FMC "that the exemption will not result in substantial reduction in competition or be detrimental to commerce." The FMC was thus required to make such a finding before passing the tariff filing dispensation on which defendants claim to have relied.

Section 1715 is quite clear in laying out the criteria for the granting of filing exemptions: no "substantial reduction in competition" nor a "[detriment] to commerce" may result from the exemption. The agreements that defendants secured during their bid rigging scheme, however, accomplished just those ends: indeed, it was precisely by a

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[2] Indeed, it would appear that the reach of the immunity in § 1706(a)(2)(B) is not as broad as defendants assume. Gosselin and Pasha focus on the tariff disclosure dispensation they received, but the statutory provision clearly requires a reasonable belief in an exemption from "any filing or publication requirement of" the Shipping Act. § 1706(a)(2)(B) (emphasis added). Section 1706(a)(2)(B) thus refers not only to § 1707--the tariff disclosure provision--but also § 1704, which governs disclosure of "agreement[s]." And § 1704(a), by its terms, extends to agreements that "control, regulate, or prevent competition in international ocean transportation." § 1703(a)(6). The agreements secured during the course of defendants' scheme would qualify under this definition, making them subject to a "filing or publication requirement of" the Act under § 1706(a)(2)(B). But if this is so, defendants' would hardly have a "reasonable basis to conclude that" their "activity or agreement[s]" were exempt from "any " disclosure provision of the statute, as they must to be immunized under § 1706(a)(2)(B).

"reduction in competition" that Gosselin and Pasha succeeded in inflating bids above the prime level, and this result was clearly "[detrimental] to commerce." The incongruence between the conditions that § 1715 sets forth and the effects of defendants' bid-rigging scheme erodes defendants' claim that they reasonably understood the tariff filing exemption to permit such activity.

Pasha and Gosselin complain that the ex ante judgment of the FMC under § 1715 should not apply ex post to our interpretation of the reasonableness standard under § 1706(a)(2)(B). But the statutory phrase "with a reasonable basis to conclude," § 1706(a)(2), clearly contemplates an inquiry into the propriety of a party's belief in light of the circumstances. And one of those circumstances is surely the terms of the statute governing the exemption. As sophisticated businesses operating in a regulatory regime, defendants are properly charged with knowledge of the statute that applies to their behavior. *Accord Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1548 (9th Cir. 1989) (citing *Kansas Power & Light Co. v. Burlington Northern R. Co.*, 544 F. Supp. 1336, 1347 (D. Kan. 1982)) (indicating that "specialized knowledge" including of "statutory ... law" may properly be presumed of parties according to their "experience"). Thus aware of the criteria set forth in § 1715, Gosselin and Pasha can hardly claim a "reasonable basis to conclude that" their behavior was covered by the tariff filing exemption. § 1706(a)(2). An exemption conditioned upon no "substantial reduction in competition" simply should not be read to sanction, in any manner, behavior intended to accomplish just such a reduction. § 1715.

Moreover, defendants' position flies once again in the face of the maxim that exceptions to antitrust liability should be narrowly construed. Gosselin and Pasha's claim that the scope of the tariff filing exemption somehow applies to the

stark anticompetitive agreements here is simply not persuasive. Section 1706(a)(2)(B) may well extend to behavior taken pursuant to an FMC filing or exemption whose anti-competitive effects are inadvertent, tangential, or debatable. But when, as here, the anticompetitive effects are intentional, direct, and palpable, reading § 1706(a)(2)(B) to insulate these effects from liability would encourage gross violations of the antitrust laws and vitiate the canon of construction that aims to protect the operation of these laws.

For the foregoing reasons, we do not believe that Congress intended § 1706(a)(2)(B) to confer immunity on the kind of conduct for which defendants are being prosecuted. We therefore find that defendants' scheme to rig bids is not exempt from antitrust under § 1706(a)(2)(B).

C.

The final part of the Shipping Act under which defendants claim immunity is § 1706(c)(1). This provision states that "[a]ny determination by an agency or court that results in the denial or removal of the immunity to the antitrust laws set forth in [§ 1706(a)] shall not remove or alter the antitrust immunity for the period before the determination." Defendants contend that an adverse decision on one of the two other statutory immunities they seek-- § 1706(a)(4) and § 1706(a)(2)(B)--constitutes a "denial or removal," and that § 1706(c)(1) thus requires that any penalty be imposed only prospectively.

Section 1706(c)(1) was designed for those instances in which a firm has been operating under a clearly established statutory immunity, whose validity or scope is subsequently called into doubt--for instance because of a changed circumstance or because of some discrete action on the part of the firm that the statute prohibits. *See, e.g.*, § 1709 (listing a variety of prohibited actions for firms operating

under filed tariffs or agreements). When such an event occurs and immunity is abrogated, § 1706(c)(1) ensures that subsequent legal or administrative proceedings will not impose liability for the period between the event and the proceedings. The provision thus affords the regulated firm some time to re-engage the administrative process or otherwise render itself compliant. Under this interpretation, § 1706(c)(1) promotes beneficial reliance by the regulated industry on the regulatory process, particularly when the event that abrogates immunity is the invalidation of a filed tariff or operating agreement. Congress was evidently mindful of this end in passing this provision. *See, e.g.*, H.R. Rep. No. 98-53, pt. 1, at 33 (1983) ("[Section 1706(c)] is needed to provide a degree of stability and certainty to an agreement filed in good faith and valid on its face.")

To qualify for relief under § 1706(c)(1), defendants must therefore identify a discrete event that triggers the provision's grace period. Obviously, that event cannot be our present denial of immunity under another statutory provision of the Shipping Act, as defendants would have it. Were we to countenance such an argument, a maritime firm wishing to avoid full antitrust liability would simply invent a series of spurious immunity arguments and remain perpetually one step ahead of the judicial or administrative proceedings invalidating them. Such a state of affairs would be the antithesis of the antitrust protections that the maxim requiring narrow construction of exemptions therefrom contemplates. *See Seatrain*, 411 U.S. at 732-33. We therefore reject defendants' interpretation of § 1706(c)(1).

D.

In short, we hold that defendants' scheme to rig bids does not qualify for immunity under any of the three provisions Gosselin and Pasha rely on-- § 1706(a)(4), §

1706(a)(2), and § 1706(c)(1).[3] We therefore conclude that defendants enjoy no immunity from antitrust prosecution under the Shipping Act.[4]

IV.

The charging information also contained a conspiracy to defraud count. *See* 18 U.S.C. § 371 (2000). Defendants argued in their motion to dismiss that the immunity provisions of the Shipping Act were broad enough to insulate them from liability under a conspiracy to defraud theory. Despite the district court's conclusion that defendants were indeed immunized from antitrust liability by the Shipping Act, the court found that this immunity did not extend to conspiracy to defraud. Employing the test set forth in

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[3] Because we reach this conclusion on the substance of defendants' immunity arguments, we need not address the government's alternative contention that the agreements for which Gosselin and Pasha seek immunity are beyond the coverage provisions of the Shipping Act and likewise beyond the FMC's jurisdiction. *See* § 1703; *see also Tucor*, 189 F.3d at 837 (discussing a similar argument made in that case).

[4] One of the factors on which the district court rested its contrary determination was the "rule of lenity." Under this principle of interpretation, the application of ambiguous criminal statutes should be resolved in favor of a defendant. *See, e.g.*, *Rewis v. United States*, 401 U.S. 808, 812 (1971). The Supreme Court has counseled, however, that there must be a "genuine ambiguity" before lenity will apply, *Perrin v. United States*, 444 U.S. 37, 49 n. 13 (1979), and has warned that no such ambiguity exists when "the ambiguous reading relied on is an implausible reading of the congressional purpose." *Caron v. United States*, 524 U.S. 308, 316 (1998). The Court has also directed that "traditional tools of statutory construction" should be consulted before ambiguity is found. *Id.* (citing *United States v. Shabani*, 513 U.S. 10, 17 (1994)). Finding, as we do, that such "traditional tools," including "congressional purpose" and ordinary canons of statutory construction, suffice to resolve the interpretive issues before us, we see no occasion for resort to the rule of lenity.

Blockburger v. United States, 284 U.S. 299 (1932), the district court further determined that the elements of the antitrust claim did not subsume those of the conspiracy to defraud claim. The district court thus concluded that defendants could properly be prosecuted for the same behavior under both counts. *See United States v. Ashley Transfer & Storage Co., Inc.*, 858 F.2d 221, 224-25 (4th Cir. 1988) (finding that conduct may form basis for prosecution under § 371 following acquittal on Sherman Act count). As a result, the court rejected defendants' motion to dismiss the fraud count on Shipping Act immunity grounds, and, following the terms of the plea agreements, Gosselin and Pasha pled guilty under § 371.

We have concluded that defendants enjoy no antitrust immunity under the Shipping Act. We therefore need not determine, as the district court did, whether immunity under the Shipping Act extends to anticompetitive behavior that is also actionable under a conspiracy to defraud theory. Furthermore, defendants concede on appeal that the district court's Blockburger analysis is "certainly correct" and that "simultaneous Sherman Act and Section 371 prosecutions are not multiplicitous." Prosecution of defendants' particular course of action under both statutes is therefore permissible.

In reviewing the district court's disposition of the conspiracy to defraud counts, it remains only to address the contention, raised on appeal, that there is insufficient factual support in the plea agreements and incorporated statement of facts for an adjudication of guilt under § 371.

Challenges to the factual basis for an adjudication of guilt following a guilty plea are severely circumscribed. "A voluntary and intelligent plea of guilty is an admission of all the elements of a formal criminal charge." *United States v. Willis*, 992 F.2d 489, 490 (4th Cir. 1993) (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)). A defendant

who pleads guilty therefore "admits all of the factual allegations made in the indictment," *O'Leary v. United States*, 856 F.2d 1142, 1143 (8th Cir. 1988) (*per curiam*), and waives "all non- jurisdictional defects, including the right to contest the factual merits of the charges." *Willis*, 992 F.2d at 490 (internal citations omitted); *see also United States v. Wiggins*, 905 F.2d 51, 52 (4th Cir. 1990). In these circumstances, courts have permitted a defendant to challenge an adjudication of guilt only with the argument that "the facts underlying the charge" are insufficient "to constitute a crime." *Stanback v. United States*, 113 F.3d 651, 654 (7th Cir. 1997).

The most that Gosselin and Pasha may argue, therefore, is that the allegations in the plea agreements and the incorporated statement of facts are so insubstantial that they could not constitute an offense under § 371. It is clear that the factual recitations in the plea documents easily surmount this low hurdle. Conspiracy to defraud under § 371 requires three elements: "(1) the existence of an agreement, (2) an overt act by one of the conspirators in furtherance of the objectives, and (3) an intent on the part of the conspirators to agree as well as to defraud the United States." *United States v. Tedder*, 801 F.2d 1437, 1446 (4th Cir. 1986). The statute covers "not only conspiracies intended to involve the loss of government funds but also any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government." *Id.* The statement of facts laid out in some detail the course of defendants' conspiracy, including the discrete agreements Gosselin and Pasha secured with various firms engaged in the bidding cycle. The statement of facts also unequivocally recites that the foregoing actions "[increased] the rates paid by DOD for the transportation of military goods during the [cycle] to levels higher than would have prevailed in the absence of their conspiracy." The stipulation therefore contains an abundance of information to establish a

conspiracy to "[impair] ... the lawful function of [a] department of government," id.--namely the MTMC program.

V.

The final contention that Gosselin and Pasha raise on appeal concerns their sentence. Following the adjudication of guilt on the conspiracy to defraud count, the district court considered the sentences that the parties had agreed to recommend in the event of this outcome. The district court settled on the figure recommended in the plea agreements--a fine of $4.6 million for each defendant for its part in the conspiracy to defraud. Gosselin and Pasha now argue that this fine exceeded the maximum permissible under the relevant sentencing statute, 18 U.S.C. § 3571 (2000). They assert that the "gross loss" to the government as a result of the conspiracy to defraud was only $1 million, *id.* § 3571(d), less than the $2.3 million amount on which the plea agreements' sentencing recommendations for the § 371 count were predicated.

The sentencing arrangement that the parties agreed to is carefully set out in each plea document. In the event of an adjudication of guilt, "the United States and the defendant agree that the appropriate disposition of this case is, and agree to recommend jointly, that the Court impose a sentence requiring the defendant to pay to the United States a criminal fine...." The agreements further provide that "Count 1 and Count 2 are [to be] grouped together" for sentencing purposes, "and thus, the total fine paid will be the greater of" two figures that each sentencing agreement recites. The first figure is derived by applying various listed Sentencing Guidelines factors to the penalty provisions governing Sherman Act violations. The second figure is derived by applying various listed Sentencing Guidelines factors to the penalty provisions governing § 371 violations.

Operating under the assumption that defendants were guilty only of conspiracy to defraud, the district court limited its attention during sentencing to the conspiracy to defraud part of each plea agreement's sentencing recommendation. We have found additionally that the Shipping Act affords defendants no immunity from the antitrust count. We therefore vacate the sentence and remand for resentencing in light of our immunity holding and the entirety of each plea agreement's sentencing provisions.

VI.

We have found that the three immunity provisions of the Shipping Act under which Gosselin and Pasha claim antitrust immunity afford them no relief. We have also determined that there was no error in the district court's adjudication of guilt on the conspiracy to defraud count. Because the district court applied the sentencing provisions of the plea agreement under the assumption that defendants were only guilty of conspiracy to defraud, a remand for resentencing in light of our disposition of the antitrust issue is in order. The judgment of the district court is therefore

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR RESENTENCING.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF VIRGINIA,
Alexandria Division

UNITED STATES of America,
v.
GOSSELIN WORLD WIDE MOVING N.V. and The Pasha Group, Defendants.
No. 1:03cr551 (GBL).
Aug. 16, 2004.

MEMORANDUM OPINION

LEE, District Judge.

THIS MATTER is before the Court on Defendant Gosselin World Wide Moving N.V.'s ("Gosselin") Motion to Dismiss the Information for Failure to State an Offense, and Defendant Pasha Group's ("Pasha") Motion to Dismiss Criminal Information. This is a criminal case, which arises out of Defendants' alleged antitrust violations. The Government alleges that Defendants violated 15 U.S.C. § 1, conspiracy to restrain trade (Count I), and 18 U.S.C. § 371, conspiracy to defraud the United States (Count II). Both Gosselin and Pasha have entered into a plea agreement with the Government, conditioned upon the outcome of the Court's ruling on these motions.

Five issues exist before this Court. First, whether Defendants alleged conduct falls within an exception to the antitrust laws as specified in Section 1706(a)(4) (codified at 46 U.S.C. app. § 1706(a)(4)) of the Shipping Act of 1984 ("Shipping Act"). Second, whether the language of Section 1706(a)(4) of the Shipping Act is so ambiguous as to warrant the Court's application of the rule of lenity, mandating dismissal of the criminal information. Third, independent of the issues raised by Section 1706(a)(4) of the Shipping Act,

does Section 7(a)(2) (codified at 46 U.S.C. app. § 1706(a)(2)) of the Shipping Act further exempt Defendants' conduct from the antitrust laws. Fourth, if the Court finds that antitrust immunity does not apply to Defendants in this case, whether Section 7(c)(1)(codified at 46 U.S.C. app. § 1706(c)(1)) of the Shipping Act provides Defendants retroactive immunity. Fifth, does the Government state an independent basis for fraud independent of the Sherman Act violation.

The Court holds that under a plain reading of Section 1706(a)(4) of the Shipping Act, Defendants' activity does "concern" the foreign inland segment of through transportation. As such, Defendants alleged conduct is not within the purview of the antitrust laws pursuant to the Shipping Act's antitrust immunity provisions.

Second, even assuming *arguendo,* that Defendants alleged conduct was not immune from the antitrust laws under a plain reading of Section 1706(a)(4), the Court holds that as a matter of law, the statutory and common law rules of lenity mandate dismissal of the pending criminal information.

Third, the Court holds that, independent of antitrust immunity Defendants enjoy pursuant to a plain reading of Section 1706(a)(4) of the Shipping Act, Defendants shipping activity involving military household goods is exempt from the Federal Maritime Commission's tariff filing and publication requirements, and thus is immunized from antitrust scrutiny under Section 1706(a)(2) of the Shipping Act.

Fourth, the Court holds that under Section 7(c)(1) of the Shipping Act (codified at 46 U.S.C. app. § 1706(c)(1)), Defendants are entitled to retroactive immunity under the Shipping Act. However, this argument is moot because the Court finds that Defendants have immunity under a plain

reading of Section 1706(a)(4), and alternatively under the statutory and common law rules of lenity.

Fifth, the Court holds that the Government states a basis for fraud against Defendants, independent of the Sherman Act violations. Where the same conduct violates two different criminal statutes, the Government can prosecute and punish it under both statutes, as long as each statutory provision requires proof of a fact which the other does not. Therefore, the Court holds that Defendant Gosselin's Motion to Dismiss the Information for Failure to State an Offense is PARTIALLY GRANTED, and Defendant Pasha's Motion to Dismiss Criminal Information is PARTIALLY GRANTED. The Court DISMISSES Count One of the Criminal Information.

BACKGROUND

Basic Facts

This case arises out of an alleged antitrust "price-fixing" case that the Government has brought against two companies, Gosselin, a Belgian company headquartered in Antwerp, Belgium, and Pasha, a United States company headquartered in Corte Madera, California. Count I of the Indictment alleges conspiracy to restrain trade in violation of Title 15, United States Code, Section 1. Count II of the Indictment alleges conspiracy to defraud the United States, in violation of Title 18, United States Code, Section 371.

Gosselin and Pasha are both in the business of shipping the household goods of U.S. military personnel from their European homes to foreign ports. In November 2003, Gosselin and its Managing Director Marc Smet were indicted for violating the Sherman Act and conspiring to defraud the United States. The Government has since dismissed the Indictment against Mr. Smet. The November 2003 Indictment was superceded by a Criminal Information, which

the Government filed on February 13, 2004. The Criminal Information charged Gosselin and its alleged co-conspirator, Pasha. Defendants entered a conditional plea of guilty to the Criminal Information, in which they expressly reserved the right to file this motion to dismiss.

The International Through Government Bill of Lading Program

The alleged price fixing conspiracy revolves around the International Through Government Bill of Lading ("ITGBL") program. The Department of Defense ("DOD") pays for this program, whose purpose is to transport military and civilian personnel household goods to and from foreign countries. The ITGBL is administered by the Military Traffic Management Command ("MTMC"). MTMC solicits bids from U.S. freight forwarders (also called carriers). Freight forwarders are the companies that shoulder the ultimate responsibility for the military household goods shipment between the U.S. and foreign countries. *See* Statement of Facts at 5.

Freight forwarders subcontract with other service providers for each component of the transportation. The other service providers are (1) local foreign moving and storage companies, (2) foreign port agents, (3) ocean carriers, (4) U.S. port agents, and (5) U.S. moving and storage companies. Criminal Information ¶ 10; Statement of Facts ¶ 7. Freight forwarders obtain rate commitments from the service providers for each of the components, add their own markup, and combine these bids into what is called a "through rate." In putting together their through rates, U.S. freight forwarders must consider the costs for each of these services, plus the costs of a booking agent to monitor shipments, physical inputs, such as liftvans and warehouses, and finally, overhead and profit. The through rate is then submitted to the MTMC.

The MTMC conducts bidding twice a year for six-month cycles in a two-step bidding process. *See* Statement of Facts ¶¶ 4, 13. In the first step, or "initial filing," U.S. freight forwarders file their "through rates" in each route--called a "channel."[1] The lowest bidder in the initial filing sets what is called the "prime rate." The carrier that sets the prime rate for a channel is guaranteed a predetermined percentage of the shipments for that particular channel. A carrier may instead file an "administrative high" rate to indicate its intent not to file competitively at the initial filing stage, while reserving the right to file again at the second stage, known as the "me-too" stage. *See* Statement of Facts ¶ 15.

After the initial filing, MTMC publishes a list of the lowest five bids received by MTMC for each channel. Statement of Facts ¶ 16. During the "me-too" bidding period, carriers that did not set the "prime rate" may match, or "me-too" the lowest rate and receive a guaranteed fraction of the shipments moved on that particular channel. *Id.* Alternatively, carriers can file a rate higher than the low rate; however, MTMC will ship household goods using carriers with higher filed rates only after all carriers with lower rates on file exhaust their capacity.

Gosselin and Pasha have two roles within the ITGBL program. First, Pasha and Gosselin act as exclusive co-agents of an association of freight forwarders called the International Shippers' Association ("ISA"). Statement of Facts ¶ 10. Pasha and Gosselin negotiate a "service contract" on behalf of ISA with the Trans Atlantic American Flag Line Operators ("TAAFLO"), an immunized conference of U.S. ocean common carriers. Statement of Facts ¶¶ 9-10. ISA

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[1] Each "channel" is a route to or from a particular state and a specific foreign country. For instance, a channel originating from a U.S. military base in Germany to the servicemember's new home in Virginia would be designated "Germany-Virginia."

members receive discounted ocean rates from TAAFLO in exchange for committing to ship a specified volume of cargo over a set period of time. As compensation for acting as ISA's agents, Pasha and Gosselin receive a set commission fee. Statement of Facts ¶ 10.

Second, Pasha and Gosselin act as General/Booking Agents for many of their customers. MTMC requires each carrier to appoint a General/Booking Agent to serve as its local representative in Germany to receive bookings. Statement of Facts ¶ 7. As a General/Booking Agent, Defendants offer their customers the option to purchase ocean transportation together with foreign inland services (packing, trucking, and port services) that the Defendants procure from local foreign agents. Statement of Facts ¶ 12. Defendants then bill the carriers the rate fixed by the ISA-TAAFLO service contract for ocean transportation (which includes Defendants set commission) plus the rate for the foreign inland services. *Id.* This combined rate is referred to as the "landed rate." *Id.* A "landed rate" is essentially an offer to obtain foreign inland services for the carrier and then to bill those services together with the ISA-TAAFLO service contract rate for the ocean shipping. *Id.*

The Alleged Price Fixing Conspiracy

The Government states that in the initial filing for the summer of 2002 (which occurred in 2001), a U.S. freight forwarder (or carrier--referred to hereinafter as "FF-1") filed the prime rate in 26 of 52 channels from Germany to the United States. Statement of Facts ¶ 18. FF-1 did not use the landed rate of either Defendant. *Id.* In 12 of these 26 channels, FF-1's through rates were at least $3.00 per hundredweight lower than those carriers using Defendants' landed rates. *Id.* In December 2001, MTMC published FF-1's bids, along with those of the next four lowest bidders. U.S.

carriers then had until January 16, 2002 to file their second round "me-too" bids. Statement of Facts ¶ 19.

On December 26, 2001, Gosselin's managing director sent an email to a landed rate competitor, an unindicted co-conspirator, identifying the 12 channels. Statement of Facts ¶¶ 20, 21. Gosselin's managing director prepared a spreadsheet targeting those channels for elimination and sent it to the unidentified co-conspirator, saying that, by "not taking the low into consideration we would increase the rate level with an average of 3.63 USD ... This is the only thing that in my mind can happen." *Id.* The head of the unindicted co-conspirator organization responded, "[A]gree to your position ... You know if we do not reach and give [the] industry a clear message which rate to base the m/2 [me-too] on, then everyone will use the low [prime] rate and later expect us [the landed rate providers] to reduce our rates so those carriers can work under their m/2 rates." *Id.*

Gosselin sent these emails to the chief executive of Pasha with the note, "I don't know where you are at this moment with [the landed rate to a Pasha freight forwarder] but what rate levels would you be able to support if those [12] states would go to the second level? I think it is important we move rather quickly now. Maybe when you have a chance we can talk in the next days." Statement of Facts ¶ 21. Pasha thereafter allegedly agreed with Gosselin to act to eliminate the prime through rates in 12 of the 26 channels and replace them with higher rates at the second-low level. Statement of Facts ¶ 24.

To implement the agreement, Gosselin's managing director agreed to pay a specified rate to twelve of the largest German packing and hauling agents in return for their agreement not to "handle business" for carriers in the 12 channels unless those carriers filed "me-too" rates at or above the second-low level. Statement of Facts ¶ 22.

On January 8, 2002, in a fax letter edited and approved by Gosselin's managing director, the agents informed U.S. freight forwarders that they "will offer their capacity only to those carriers me-tooing the second rate level into the [enumerated 12] states .... It was emphasized strongly that business to these states will only be handled at the second low rate level, so, me-too can only happen at this level." Statement of Facts ¶ 23. Gosselin sent a copy of this fax to Pasha on January 9, 2002. *Id.*

Through correspondence with FF-1 in the United States, Defendants agreed with FF-1 that it would cancel its prime rates in the 12 targeted channels, on the understanding that no other U.S. freight forwarder would me-too those prime through rates or file a rate below the second-low level. Statement of Facts ¶ 27. To deliver on their promise to FF-1, Defendants obtained the agreement of most of the other U.S. freight forwarders not to me-too the prime through rates in those 12 channels, but instead to file me-too rates at or above the second-low level. *Id.* The carriers overwhelmingly filed me-too through rates at or above the second low level in the 12 targeted channels. Statement of Facts ¶ 28. In the few instances where the carriers either ignored or misunderstood the instructions and filed me-too rates lower than the second-low level, Defendants directed them to agree to cancel those lower rates, and they did. Statement of Facts ¶¶ 29-30. Defendants also supplied misleading information to DOD personnel in Germany to ensure that DOD did not tender any shipments to a freight forwarder with a me-too rate on file below the second-low level. Statement of Facts ¶¶ 29, 31.

The Government contends that as a result of the Defendants alleged conspiracy, DOD overpaid for the transportation of military household goods by approximately $1 million during the summer of 2002. Statement of Facts ¶ 33.

The Parties Arguments

The Defendants argue that the facts as stated above (as agreed to in the Statement of Facts) are a direct consequence of an initial agreement among local German agents to fix the terms and conditions under which they would provide packing services and local trucking services in Germany to U.S. carriers. According to Defendants, the German agents agreed among themselves, in advance of the ITGBL carriers' decision regarding what rates to file with MTMC, not to provide service for any carrier that filed rates with MTMC below a certain level. The German agents thereafter undertook to inform the industry of their agreement and acted to ensure that it would be carried out within the framework of MTMC's regulatory program. *See* Mem. of the Pasha Group in Supp. of Mot. to Dismiss Criminal Information (hereafter referred to as "Pasha Memorandum") at 6. Defendants contend that they had a duty to inform their ITGBL carrier customers of the German Agents' actions, which comprise the Government's charge of conspiracy.

Defendants maintain that Section 1706(a)(4) of the Shipping Act (46 U.S.C. app. § 1706(a)(4)) provides that the antitrust laws allow them an exemption, because their business "concern[ed] the foreign trade segment of through transportation." Section 1706(a)(4) of the Shipping Act provides:

> The antitrust laws do not apply to --
> (4) any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade.

Defendants contend that this statutory language is broad, with little definition of the terms. Defendants further argue that *United States v. Tucor*, 35 F. Supp. 2d 1172 (N.D. Cal.

1998), *aff'd,* 189 F.3d 834 (9th Cir. 1999), has facts analogous to those at hand, and supports the Defendants' statutory interpretation.

Regardless, even if the Court found that Section 1706(a)(4) of the Shipping Act did not apply to Defendants, because the statute is so ambiguous, Defendants were not given a "fair warning" of criminal conduct, and the statutory and common law rules of lenity mandate that the Court dismiss the pending Criminal Information. Defendants note that they relied upon the holding in *Tucor* in making the determination that their conduct was legal.

Defendants also assert that, independent of Section 1706(a)(4) of the Shipping Act, Section 1706(a)(2) of the Shipping Act also gives Defendants immunity from the antitrust laws. Section 1706(a)(2)(B) states that the antitrust laws do not apply to:

> "any activity or agreement within the scope of this chapter, whether permitted under or prohibited by this chapter, undertaken or entered into with a reasonable basis to conclude that ... it is exempt under Section 1715 of this title from any filing or publication requirement of this chapter."

See 46 U.S.C. app. § 1706(a)(2)(B).

Defendants contend that Subsection (a)(2)(B) references Section 1715 of the Shipping Act, which empowers the Federal Maritime Commission ("FMC") to exempt any class of agreements or any specified activity from application of the tariff filing requirements under the Shipping Act. Defendants opine that in order to show that the conduct in the Criminal Information is covered by Section 1706(a)(2)(B) immunity, they must show that (a) the FMC has exempted carriers such as Defendants from a filing or publication

requirement pursuant to its authority under Section 1715 and (b) Defendants' conduct as described in the Statement of Facts constituted activities or agreements for which there was a reasonable basis to conclude that such activities or agreements fell within the scope of the Section 1715 exemption.

Defendants argue that one of the exemptions granted under Section 1715 covers the filing and publication requirements for tariffs in connection with "[t]ransportation of used military household goods and personal effects by ocean transportation intermediaries." *See* 46 C.F.R. § 520.13(c). "Ocean transportation intermediaries" include non-vessel owning common carriers ("NVOCC") and freight forwarders. *See* 46 U.S.C. app. § 1702(17). According to Defendants, they are classified in the Statement of Facts as a NVOCC and therefore they fall within the FMC's Section 1715 exemption from publishing tariffs for military household goods. Statement of Facts ¶ 9. Based on their status as a NVOCC and the resulting exception from having to publish tariffs, Defendants are afforded by statute broad immunity against the antitrust laws.

Defendants also assert that they have immunity against the antitrust laws through Section 7(c)(1) of the Shipping Act. This Section reads:

> Any determination by an agency or court that results in the denial or removal of the immunity to the antitrust laws set forth in subsection (a) of this section shall not remove or alter the antitrust immunity for the period before the determination.

Defendants opine that if the Court were to find that they did not have immunity in this case, this section prevents the Government from prosecuting them for antitrust violations,

because they had antitrust immunity for the period before the Court determined that immunity did not apply.

Defendants also assert that the alleged fraud violation is premised on the same conduct that allegedly constitutes the charged antitrust violation. Therefore, Defendants argue, if the Court finds that it has antitrust immunity, it must also dismiss the fraud count.

The Government argues that the Defendants story regarding the German agents conspiracy is outside the scope of the Criminal Information and the Plea Agreement, which all parties agreed to. Therefore, the Government maintains that the Court cannot consider any of these assertions by Defendants.

In addition, the Government contends that *Tucor* does not apply in this case. The Government argues that *Tucor* involved Filipino shippers who shipped only within the Philippines and thus concerned *only* the foreign inland segment of through transportation. The Government maintains that Defendants conduct constituted a conspiracy that not only focused on the foreign inland segment of the transportation--from military bases in Germany to the German port--but extended to the United States.

The Government argues that Defendants reading of the statute raises a perverse escape valve for many antitrust violators doing business overseas that Congress could not have intended. The Government opines that Defendants main argument-- that even if they were involved in through transportation, their conduct did "[concern] the foreign inland segment of through transportation"--is over broad.

The Government also argues that the Shipping Act's 1706(a)(4) immunity does not apply to Defendants. The Government contends that the antitrust immunities provided

for in Section 7 apply only to agreements "by or among ocean common carriers" and "marine terminal operators" as set forth in Section 4 of the Act. The Government submits that this case does not concern ocean common carriers or marine terminal operators. Therefore, the Government concludes, immunity is not applicable here.

The Government also opines that Defendants' argument for lenity is misguided. Specifically, the Government maintains that the Court should only adhere to the rule of lenity when a statute is so ambiguous that the Court can make no sensible interpretation of it. In addition, the Government argues that most statutes are ambiguous to a degree, and the Court would create bad precedent by finding this particular statute ambiguous.

In addition, the Government contends that the Court should fully read Section 1715 of the Shipping Act, which permits the FMC to exempt from filing, "by order or rule ... any class of agreements between persons subject to this chapter or any specified activity of those persons from any requirement of this chapter if it finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce." The Government opines that the agreement between Defendants referenced in the Criminal Information directly flies in the face of this rule because it fixes the market and is detrimental to both competition and commerce.

The Government also maintains that the exemption authority that Defendants cite, 46 C.F.R. §§ 531 and 536, only exempt Defendants from filing tariffs. It does not extend to any activity associated with the filing of that tariff--in this instance the antitrust violation. The Government contends that the FMC concluded that "existing tariff filings no longer served any regulatory purpose" because MTMC had its own competitive bidding program. 46 Fed. Reg. at 35092. The

Government asserts that the FMC's reliance upon competitive bidding in its actions to exempt carriers such as Defendants from filing tariffs only proves that its intent was not to also exempt antitrust, anti-competitive behavior.

The Government also claims that Section 7(c)(1) immunity does not apply in this situation because Defendants never had any form of antitrust immunity. The Government further contends that Section 7(c)(1) applies to agreements that have been filed with the FMC, and have been effective under the Act or have otherwise been entitled to immunity. The Government asserts that Defendants agreements were never filed with the FMC, and thus, are not covered under this statutory provision. The Government further maintains that the legislative history states that the provisions of Section 7(c)(1) are to protect agreements filed in good faith and valid on their face, while a Court or other tribunal makes a determination as to whether immunity applies or not.

Finally, the Government opines that even if the Court grants antitrust immunity in this case, it can prosecute Defendants under the fraud statute. The Government postulates that where the same conduct violates two different criminal statutes, it can prosecute and punish under both statutes, as long as each statutory provision requires proof of a fact which the other does not.

DISCUSSION

Standard of Review

A motion to dismiss tests whether the Criminal Information sufficiently charges an offense. *United States v. Brandon,* 150 F. Supp. 2d 883, 884 (E.D. Va. 2001), aff'd, 298 F.3d 307 (4th Cir. 2002) (citing *United States v. Sampson,* 371 U.S. 75, 78-79 (1962)). A Criminal Information must contain "a plain, concise and definite written statement of the essential facts constituting the offense charged." *Id.* (citing Fed. R. Civ. P. 7(c)(1)).

Court's analysis must extend beyond determining whether the Criminal Information contains the core elements of the charged crime. *Brandon*, 150 F. Supp. 2d at 885. A Criminal Information should be dismissed if its factual allegations, even if proven beyond a reasonable doubt, fail to constitute the crimes charged. *Id.* If the "infirmity in the prosecution is essentially one of law," the Court may, on a motion to dismiss, decide whether the Criminal Information charges a crime. *United States v. Salman*, 266 F. Supp. 2d 1367, 1373 (M.D. Fla. 2003).

ANALYSIS

A. Defendants Version of the Alleged Conspiracy

The Court holds that it cannot consider in its analysis of this case the additional facts that Defendants supply, concerning an initial price-fixing agreement among German agents. This agreement was not within the Statement of Facts. All of the parties, Gosselin, Pasha, and the Government, have agreed that the Statement of Facts and the Criminal Information form the entire factual record for purposes of the Defendants' Motions to Dismiss. *See* Plea Agreement ¶ 3.

Ordinarily, in deciding a motion to dismiss, the "indictment must be tested solely on the basis of the allegations made on its face, and such allegations are to be taken as true." *United States v. Hall*, 20 F.3d 1084, 1087 (10th Cir. 1994); *accord Boyce Motor Lines v. United States*, 342 U.S. 337, 343 n. 16 (1952).

In this case before the Court, the parties have agreed upon a Statement of Facts. Defendants have, in their pleadings, suggested a number of facts involving another agreement with German agents that influenced their actions.

These facts are outside the factual record and this Court cannot consider them in its analysis. *See also United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992).

B. 1706(a)(4) Immunity Under the Shipping Act and Lenity

Even without considering the additional facts that Defendants supply in their Motions to Dismiss, the Court holds that Section 1706(a)(4) of the Shipping Act gives antitrust immunity to the Defendants. In the alternative, the statute is so ambiguous, that the rule of lenity mandates that the Court construe the statute in favor of Defendants.

In interpreting a statute, the Court must first begin with the text. "The starting point for [the] interpretation of a statute is always its language." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989). "Courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992). "In analyzing a statute, we begin by examining the text, not by psychoanalyzing those who enacted it." *Carter v. United States*, 530 U.S. 255, 271 (2000) (Thomas, J.) (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)) and (quoting *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring in part and concurring in judgment)). Neither the Supreme Court nor any court in this judicial circuit, has interpreted the sections of the Shipping Act at issue here.

The Supreme Court commonly interprets statutory terms according to their common meaning. *See generally* William N. Eskridge, Jr., *et al.*, *Legislation and Statutory Interpretation* 253 (2000) (discussing ordinary meaning canons of statutory construction). If the plain language does not settle the question, then the Court looks to other sources, such as the legislative history, to decipher the meaning of the

ambiguous language. In a criminal case, ambiguous language must be interpreted in defendant's favor under the rule of lenity. *See Bifulco v. United States*, 447 U.S. 381, 387 (1980); *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643, 649 (2d Cir. 1993).

Examining the plain meaning of the statute, Section 1706(a)(4) of the Shipping Act states:

> The antitrust laws do not apply to --
> (4) any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade.

Unfortunately, "concerning" is not defined within the Shipping Act. However, "[a] fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). The common definition of concerning, which Defendants cite, is "to relate to; to be about; to bear on." Merriam-Webster Online Dictionary, available at *http://www.merriam-webster.com* (last visited August 1, 2004). A "foreign inland segment" is designed as the foreign non-ocean part of transportation. 46 U.S.C. app. § 1702(12). "Through transportation" means continuous transportation between origin and destination for which a single rate is charged and which is performed by one of more carriers between the United States and a foreign port.

Applying the plain meaning of the statute, the Statement of Facts is clear that Defendants' activity did "concern" the "foreign inland segment" of the through transportation. For example, Defendants provided local agent service in Germany. Criminal Information at ¶ 3. Local German agents provided services in Germany. *Id.* at ¶ 10. Defendants

arranged for local German agent services, European port agent services, and ocean transport. *Id.* at ¶ 12.

In addition, one other court, although not the Supreme Court and not a court within the Fourth Circuit, has interpreted this issue on a set of facts somewhat similar to those now before the Court. *United States v. Tucor Int'l, Inc.*, 35 F. Supp. 2d 1172 (N.D. Cal. 1998), *aff'd*, 189 F.3d 834 (9th Cir. 1999), remains the only judicial interpretation of the Shipping Act's antitrust exemption as applied to shipping household goods for Government personnel. In *Tucor*, the defendants transported military household goods in the Philippines. In that case, the Government charged the defendant with agreeing to eliminate the low prices bid by freight forwarders to the Government and to cause freight forwarders to cancel their low rates. The indictment at issue in *Tucor* charged that defendants "caused U.S. freight forwarders to cancel their low rates filed with the U.S. for the transportation of military shipments of household goods between the Philippines and the United States." *Tucor* Indictment ¶ 4(c).

After reviewing the structure of the Shipping Act, the *Tucor* court concluded that Section 1706(a)(4) immunity "means what it says." *Tucor*, 35 F. Supp. 2d at 1180, and held that the antitrust laws do not apply to an agreement or activity to raise prices or boycott freight forwarders that *concerns* the foreign inland segment of through transportation.

The Court also reviewed the legislative history of the Act for any evidence of Congressional intent that might be contrary to the plain language of the statute. The *Tucor* court found none. *See id.* at 1181-82. Specifically, the *Tucor* court held

> "Most notably, there is no discussion in the 98th Congress of the scope of the foreign inland segment immunity. Accordingly, the Court is left to draw inferences from earlier legislative history on previous unenacted versions of the bill. Certainly these inferences, even if on balance they favored the government's position, which they do not, would be insufficient to overcome the plain meaning of the Act."

Id. at 1182.

The Ninth Circuit unanimously affirmed the decision of the District Court. In particular, the court held that "section 1706(a)(4) clearly applies to any agreement--without limitation--concerning the foreign inland segment of through transportation." *United States v. Tucor Intern. Inc.*, 189 F.3d 834, 837 (9th Cir. 1999).

The Government argues that Defendants reliance on *Tucor* is unfounded. The Government argues that *Tucor* dealt with Filipino movers who moved items internally within the Philippines. The Government contends that because Defendants' alleged conspiracy involved contact with carriers and contacts with the United States, the holding in *Tucor* is inapplicable here. The Government also argues that 1706(a)(4) immunity does not apply to Defendants because the antitrust immunities provided for in Section 7 apply only to agreements "by or among ocean common carriers" and "marine terminal operators" as set forth in Section 4 of the Act. Government argues that this case does not concern ocean common carriers or marine terminal operators--therefore immunity is not applicable here.

The Government's arguments that this exemption only applies to ocean common carriers and marine terminal operators carries little weight. This is the exact same

argument that the *Tucor* court addressed. *Tucor* recognized that section 1706(a)(4) clearly, on its face, was not limited to ocean-common carriers. *Tucor,* 35 F. Supp. 2d at 1178, 1180. Because the statutory language was clear, the court concluded that legislative history was necessary only "to determine whether there [was a] clearly expressed legislative intent that is contrary to the plain language." *Id.* at 1181. The court found that the Shipping Act's legislative history actually favored the defendants' position. *Id.* at 1181-82.

Under a basic reading of the statute, Defendants' actions do "concern" the foreign inland segment of through transportation and should be exempted. The case is somewhat similar to the facts in *Tucor.* In *Tucor,* the defendants transported military household goods in the Philippines, and the Government indicted them on violations of the Sherman Act, charging a price fixing conspiracy that affected the United States. The difference between *Tucor* and this case is that in *Tucor,* the Defendants' actions stopped at the edge of the Philippines. The *Tucor* defendants only moved goods within the country itself. In this case, Defendants' respective companies are involved in all aspects of the move--both the foreign inland segment as well as the entire trip. However, a basic reading of the statute concludes that Defendants' business "concerns" the foreign inland segment.

Even assuming *arguendo,* that Defendants were not immune from the antitrust laws pursuant to Section 1706(a)(4) of the Shipping Act, the rule of lenity mandates that the Court construe the statute in favor of the Defendants. *See United States v. Plaza Health Laboratories, Inc.,* 3 F.3d 643, 649 (2d Cir. 1993) (holding that the court must decide ambiguities in the statute in the defendants favor).

The Court finds that this statute is clear. Defendants' behavior did concern a foreign inland segment of through

transportation. However, the Court does acknowledge that different definitions of "concern" exist. This Court uses the common definition of concern, which means "to relate to; to be about; to bear on." Merriam-Webster Online Dictionary, available at *http://www.merriam-webster.com* (last visited August 1, 2004); *see also Perrin v. United States*, 444 U.S. 37, 42 (1979).

The Government could argue that Congress's intent was a heightened definition of the word "concern"--such that in order to enjoy antitrust immunity Defendants' conduct would have needed to be exclusively--or significantly-- relating to the foreign inland segment of through transportation. There is no indication in the legislative history that Congress meant this. In fact, there is no legislative discussion regarding the scope of the foreign inland segment immunity. *See Tucor*, 35 F. Supp. 2d at 1182. However, this ambiguity, to the extent it even exists, only favors the Defendants.

Although the Government is correct in pointing out that all statutes, to an extent, are ambiguous, *see Muscarello v. United States*, 524 U.S. 125, 138 (1998), the rule of lenity applies only if "after seizing everything from which aid can be derived ... we can make 'no more than a guess as to what Congress intended.' " *Id.* This is the case here. Congress failed to define what "concerning" means. Specifically, whether "concerning" should be given a broad or narrow definition. This Court uses the common definition of the word. There is no doubt that *Tucor* held that any conduct dealing with the foreign inland segment of through transportation is immune under the Shipping Act. Based upon this holding, it is not unreasonable for the Court to conclude that Defendants conducted their business in accordance with the Ninth Circuit's holding. Therefore, to the extent that an ambiguity exists in the immunity clause under Section 1706(a)(4) of the Shipping Act, this Court must construe it in favor of the Defendants.

C. Shipping Act Immunization Under Section 1706(a)(2)

The Court holds that independent of the antitrust immunity Defendants enjoy pursuant to a plain reading of Section 1706(a)(4) of the Shipping Act, Defendants shipping activity involving military household goods is exempt from the Federal Maritime Commission's tariff filing and publication requirements, and thus is immunized from antitrust scrutiny under Section 1706(a)(2) of the Shipping Act.

Once again, the Court's starting point in analyzing this statute is with its plain language. *See Community for Creative Non-Violence,* 490 U.S. at 739. Section 1706(a)(2) of the Shipping Act provides that the antitrust laws do not apply to:

> any activity or agreement within the scope of this chapter, whether permitted under or prohibited by this chapter, undertaken or entered into with a reasonable basis to conclude that (A) it is pursuant to an agreement on file with the Commission and in effect when the activity took place, or (B) it is exempt under section 1715 of this title from any filing or publication requirement of this chapter.

Subsection (a)(2)(A) is inapplicable to this case because Defendants' agreement is not on file with the Federal Maritime Commission. Within the scope of the chapter is Section 1707 of the Shipping Act, which requires common carriers to publish tariffs.[2] However, subsection (a)(2)(B)

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[2] A common carrier is defined in the Shipping Act as including non-vessel operating common carriers, which both Gosselin and Pasha are. *See* Statement of Facts ¶ 9; *see also* 46 U.S.C. App. §§ 1702(6) and (17)(B).

references Section 1715 of the Shipping Act, which empowers the Federal Maritime Commission to exempt any class of agreements or any specified activity from application of the tariff.

The Federal Maritime Commission, in rules entitled "Carrier Automated Tariffs," exempts used military household goods transported by ocean transportation intermediaries from publishing a tariff. Defendants also fall within the definition of an ocean transportation intermediary. 46 U.S.C. app. § 1702(17). The exemption states:

> (c) The following cargo types are not subject to the requirements of this part [automated tariffs]: ... (3) *Used military household goods.* Transportation of used military household goods and personal effects by ocean transportation intermediaries.

46 C.F.R. § 520.13(c)(3)(2003) (emphasis in original)

The Court holds that Defendants have a "reasonable basis to conclude," based upon a reading of the above statutes, that they are immune from the antitrust laws because the publication exemption is explicit.

The Government argues two major points against this theory, both of which the Court finds unpersuasive. First, the Government argues that Section 1706(a)(2) immunizes only agreements "within the scope of this chapter." In turn, the Government contends that Section 4 of the Shipping Act "makes clear that the only agreements within the scope of this chapter are agreements among ocean carriers or marine terminal operators." Mem. of the United States in Opp. to Gosselin World Wide Moving N.V.'s and the Pasha Group's Mots. to Dismiss the Criminal Information at 22. The Government contends that neither Defendant is an ocean carrier or a marine terminal operator. This argument carries

no weight, and is simply a rehash of the Government's argument before the District Court in *Tucor.*

Section 4 of the Shipping Act, entitled "Agreements Within Scope of Act," states that the Shipping Act applies to certain agreements "by or among ocean common carriers," and "among marine terminal operators and one or more ocean common carriers." *See* 46 U.S.C. app. § 1702(a) (ocean common carriers), § 1702(b) (marine terminal operators). The Government's argument, in essence, is that this language means that the Shipping Act applies to certain agreements among *only* ocean common carriers and marine terminal operators.

As in *Tucor,* the Court finds that the Government has misinterpreted the "gap" filled by Section 1704(a) of the Shipping Act. Section 1704(a) exempts Federal Maritime Commission from filing "agreements related to transportation to be performed within or between foreign countries ..." *See* 46 U.S.C. app. § 1704(a). As in *Tucor,* "[t]he government's argument ignores the fundamental distinction between 'transportation to be performed within or between foreign countries' and 'the inland segment of through transportation.' " *Tucor,* 35 F. Supp. 2d at 1180. The Shipping Act cannot apply, as the Government argues, to certain agreements among *only* ocean common carriers and marine terminal operators because under such a theory, the statute under 1704(a) would be illogical. Ocean common carriers and marine terminal operators do not operate *within* a foreign country. It is obvious that this language deals with internal transportation, which would preclude ocean common carriers and marine terminal operators.

The Government also argues that Defendants' agreement is not exempted by Section 1715 of the Shipping Act. Section 1715 permits the Federal Maritime Commission to exempt from filing, "by order or rule," "any class of agreements

between persons subject to this chapter if it finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce." However, again the Government misinterprets the statute. The statute does not say that the only way Defendants could seek a tariff exemption is through an order or rule by the Federal Maritime Commission. The plain language of the statute states that the Federal Maritime Commission may issue this order or rule exempting a party from the tariff requirement. This Section does not reference Section 1706(a)(2) of the Shipping Act, which Defendants rely upon.

Based upon the above statutory and case law analysis, the Court holds that independent of antitrust immunity Defendants enjoy pursuant to a plain reading of Section 1706(a)(4) of the Shipping Act, Defendants' shipping activity involving military household goods is exempt from the Federal Maritime Commission's tariff filing and publication requirements, and thus is immunized from antitrust scrutiny under Section 1706(a)(2) of the Shipping Act.

D. Immunity Under Shipping Act Section 1706(c)(1)

The Court holds that under Section 7(c)(1) of the Shipping Act (codified at 46 U.S.C. app. § 1706(c)(1)), Defendants are entitled to retroactive immunity under the Shipping Act. However, this argument is moot because the Court finds that Defendants already have immunity under a plain reading of Section 1706(a)(4), and alternatively under the statutory and common law rules of lenity.

As described above, Defendants have immunity from the antitrust laws. However, even assuming arguendo, that Defendants did not have immunity under the antitrust laws, Section 1706(c)(1) would grant Defendants retroactive immunity. Section 1706(c)(1) reads:

> Any determination by an agency or court that results in the denial or removal of the immunity to the antitrust laws set forth in subsection (a) of this section shall not remove or alter the antitrust immunity for the period before the determination.

Once again, the Court's starting point in analyzing this statute is with its plain language. *See Community for Creative Non-Violence,* 490 U.S. at 739. In examining the plain language of this statute, it is apparent that the purpose of this section is to not penalize parties who in good faith believe that they have antitrust immunity, if a Court takes that immunity away.

Court finds that, based upon the Ninth Circuit's decision in *Tucor,* that the Defendants acted in good faith in considering their actions immune from the antitrust laws. Based upon the Ninth Circuit's holding in *Tucor,* the Defendants could have reasonably concluded that they had antitrust immunity in their activities abroad. This statute expressly prohibits the retroactive application of the removal or denial of immunity under the statute. *Tucor,* 35 F.Supp.2d at 1181-82. Based upon these factors, Defendants would enjoy retroactive immunity.

E. Independent Basis for Fraud

The Court holds that the Government states a basis for fraud against Defendants, independent of the Sherman Act violations. "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States,* 284 U.S. 299, 304 (1932). In *Whalen v. United States,* 445 U.S. 684, 691 (1980), the Supreme Court held that courts are to apply this "rule of

statutory construction," described in *Blockburger,* "to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively." *Id.*

In this case, the Sherman Act count and the fraud count both require proof of a fact that the other does not. The Sherman Act count requires that the Government show that Defendants had an effect on interstate or foreign commerce but not an effect on the Government. The fraud count, under 18 U.S.C. § 371, requires that the Government show that Defendants defrauded the Government. Section 371 does not require that the Government show that Defendants alleged fraud had an effect on commerce. *See generally United States v. Ashley Transfer & Storage Co.,* 858 F.2d 221, 223-24 (4th Cir. 1988). The Court has held that Defendants' conduct enjoys antitrust immunity under the Sherman Act. However, applying the *Blockburger* test, the Court concludes that Congress has provided that the Government can prosecute both the Sherman Act count and the fraud count cumulatively. The fact that the Court has found Defendants' conduct under the Sherman Act immune is irrelevant. The Government must, under the fraud count, prove that Defendants defrauded the United States. This is conduct that the Government need not prove under the Sherman Act count.

Defendants argue that conduct that is immune under one law cannot properly serve as the basis of a legal violation under another statute. Defendants contend that this principle is articulated in *Bath Petroleum Storage, Inc. v. Market Hub Partners, L.P.,* 129 F. Supp. 2d 578 (W.D.N.Y.), *aff'd,* 229 F.3d 1135 (2d Cir. 2000), *cert. denied,* 532 U.S. 1037 (2001). The Court disagrees. *Bath Petroleum* was a civil action involving a claim against competitors for making false statements to federal and state administrative agencies that caused plaintiff's business venture to fail. The plaintiff in this

case sued the defendants for violating Section 2 of the Sherman Act and the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The *Bath Petroleum* court dismissed the Sherman Act claim based on the Noerr-Pennington doctrine, which immunizes conduct from the antitrust laws that is directed toward influencing governmental action, such as lobbying or litigation. Defendants argue that since the RICO claim was based upon the same allegedly false statement immunized from antitrust liability by the Noerr-Pennington doctrine, the court also barred the RICO claim. This is not the holding of *Bath Petroleum*. In *Bath Petroleum*, that court held that the Noerr-Pennington immunity applies equally to RICO claims. *See also International Broth. of Teamsters v. Philip Morris*, 196 F.3d 818, 825 (7th Cir. 1999). In other words, although the Noerr-Pennington doctrine originated in antitrust law, its rationale is equally applicable to RICO suits. *Id.* at 826.

Defendants also rely on the Tenth Circuit's holding in *United States v. Beachner Constr. Co.*, 729 F.2d 1278, 1284 (10th Cir. 1984). In *Beachner*, the court held that the double jeopardy clause barred a second trial of mail fraud and antitrust claims against a defendant where the retrial involved the same conspiracy for which the defendant had already been acquitted. *Beachner* did not suggest that the Government would have been foreclosed from prosecuting defendants for mail fraud at the first trial if the antitrust charges had been dismissed. Therefore, the Court holds that the Government states a basis for fraud against Defendants, pursuant to 18 U.S.C. § 371, that is independent of the Sherman Act count.

CONCLUSION

In conclusion, Defendant Gosselin's Motion to Dismiss the Information for Failure to State an Offense is partially

granted, and Defendant Pasha's Motion to Dismiss Criminal Information is also partially granted.

First, the Court holds that under a plain reading of Section 1706(a)(4) of the Shipping Act, Defendants' activity does "concern" the foreign inland segment of through transportation. As such, Defendants' alleged conduct is immune from the antitrust laws pursuant to the Shipping Act's antitrust immunity provisions.

Second, even assuming *arguendo,* that Defendants' alleged conduct was not immune from the antitrust laws under a plain reading of Section 1706(a)(4), the Court holds that as a matter of law, the statutory and common law rules of lenity mandate partial dismissal of the pending criminal information.

Third, the Court holds that independent of Defendants' antitrust immunity pursuant to a plain reading of Section 1706(a)(4) of the Shipping Act, Defendants' shipping activity involving military household goods is exempt from the Federal Maritime Commission's tariff filing and publication requirements, and thus is immunized from antitrust scrutiny under Section 1706(a)(2) of the Shipping Act.

Fourth, the Court holds that under Section 7(c)(1) of the Shipping Act (codified at 46 U.S.C. app. § 1706(c)(1)), Defendants are entitled to retroactive immunity under the Shipping Act. However, this argument is moot because the Court finds that Defendants have immunity under a plain reading of Section 1706(a)(4), and alternatively under the statutory and common law rules of lenity.

Fifth, the Court holds that the Government states a basis for fraud against Defendants, independent of the Sherman Act violations. Where the same conduct violates two different criminal statutes, the Government can prosecute and

punish it under both statutes, as long as each statutory provision requires proof of a fact which the other does not.

For the foregoing reasons, it is hereby ORDERED that Defendant Gosselin World Wide Moving N.V.'s Motion to Dismiss the Information for Failure to State an Offense is PARTIALLY GRANTED.

It is FURTHER ORDERED that Defendant Pasha Group Inc.'s Motion to Dismiss Criminal Information is PARTIALLY GRANTED.

The Court DISMISSES Count One of the Criminal Information.

The Clerk is directed to forward a copy of this Order to counsel.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED July 12, 2005

No. 04-4752, CR-03-551

UNITED STATES OF AMERICA
Plaintiff - Appellant
v.
GOSSELIN WORLD WIDE MOVING, N.V.;
THE PASHA GROUP
Defendants - Appellees

No. 04-4876, CR-03-551

UNITED STATES OF AMERICA
Plaintiff - Appellee
v.
GOSSELIN WORLD WIDE MOVING, N.V.
Defendant - Appellant
and
THE PASHA GROUP
Defendant

No. 04-4877, CR-03-551

UNITED STATES OF AMERICA
Plaintiff - Appellee
v.
THE PASHA GROUP
Defendant - Appellant
and
GOSSELIN WORLD WIDE MOVING, N.V.
Defendant

On Petition for Rehearing and Rehearing En Banc

Appellees/cross-appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and As the panel considered the petition for rehearing and is of the opinion that it should be denied, IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Wilkinson, Judge Gregory, and District Judge Stamp, sitting by designation.

For the Court,

/s/ Patricia S. Connor

CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

United States of America	)	
	)	
v.	)	Criminal No.
Gosselin World Wide	)	
Moving N.V.	)	Violations:
and	)	15 U.S.C. § 1
The Pasha Group	)	18 U.S.C. § 371
Defendants.	)	

STATEMENT OF FACTS

The parties agree that had this case gone to trial, the United States would have presented evidence to prove the following facts. The parties also agree that this statement of facts is the stipulated factual record for purposes of the defendants' motion to dismiss.

1. The "relevant period" is the period beginning in October 2001 and continuing until October 2002.

2. Defendant Gosselin World Wide Moving N.V. (GOSSELIN N.V.) is a Belgian company headquartered in Antwerp, Belgium. During the relevant period, defendant GOSSELIN N.V. was in the business of providing, inter alia, services related to the transportation of household goods owned by the U.S. military and civilian Department of Defense ("DOD") personnel and their families ("military household goods").

3. Defendant The Pasha Group ("PASHA") is a United States corporation headquartered in Corte Madera, California. During the relevant period, defendant PASHA was in the business of providing, inter alia, services related to

the transportation of military household goods. During the relevant period, defendant PASHA, through its subsidiary, Gateways International, Inc., provided freight forwarder services to DOD, as described in paragraph 5.

4. DOD administers and coordinates its International Through Government Bill of Lading ("ITGBL") program for the transportation of military household goods between the United States and other countries where U.S. military forces are stationed through the Military Traffic Management Command ("MTMC"). MTMC, as of January 1, 2004 renamed the Surface Distribution Deployment Command, is headquartered in Alexandria, Virginia, in the Eastern District of Virginia.

5. "Freight Forwarders," also known as "forwarders" or "ITGBL carriers" are U.S. companies that submit bids and contract with MTMC and shoulder the ultimate responsibility for ITGBL shipments. Carriers that fail to perform could be penalized by MTMC in their participation in the ITGBL program.

6. "Through rates" are rates filed by freight forwarders directly with MTMC. Through rates are the rates bid to DOD by U.S. freight forwarders and paid by DOD ($/cwt) for all of the moving and transportation services provided in the door-to-door move from Germany to the United States.

7. Each ITGBL move is comprised of five steps. A move from Germany to the U.S. would require: (1) local German agent services, (2) European port agent services, (3) ocean transport services, (4) U.S. port agent services and (5) U.S. destination agent services. MTMC requires that freight forwarders appoint a General/ Booking Agent which serves as the local representative in Germany to receive bookings, and Defendants PASHA and GOSSELIN N.V. as well as

many other companies provided this service for the freight forwarders during the relevant period. "Local German Agents," are firms that provide services in Germany (whether or not they are owned by German nationals or are incorporated in Germany) including "origin" services, such as packing "liftvans" (large wooden crates used for shipping military household goods) at the German living quarters of the soldier or civilian DOD employee returning to the United States, and transporting the liftvans to a warehouse. European port agents arrange for transportation from the warehouse to a port in Northern Europe (Antwerp, Belgium or Bremerhaven, Germany). They also load the liftvans onto U.S. Flag ocean vessels and handle customs and clearance matters.

8. Ocean transport services involve shipping the military household goods from the European port to the most convenient U.S. port location. U.S. port agents arrange to unload the liftvans from the vessel and handle the shipments through customs. A. U.S. local agent then transports the liftvans from the port to the destination location and unpacks the shipment.

9. Under U.S. law, U.S. flag ocean common carriers are required to provide the ocean transport segment of an ITGBL move. Ocean carriers set their rates collectively for ITGBL movements in a conference known as the Trans Atlantic American Flag Liner Operators ("TAAFLO"), organized under the Shipping Act of 1984. Defendants GOSSELIN N.V. and PASHA, as Non-Vessel Operating Common Carriers ("NVOCCs"), are not members of the TAAFLO conference.

10. The freight forwarders participating in the ITGBL program have found an association, known as the International Shippers' Association ("ISA"), to negotiate collectively with TAAFLO to obtain rates for ocean transport

services. The rates are set forth in the service contract between ISA and TAAFLO. Defendant PASHA and a subsidiary of defendant GOSSELIN N.V. are the exclusive co-agents of ISA and receive a commission or fee for their services. All of the freight forwarders that participated in the ITGBL program during the relevant period procured ocean services from either the subsidiary of defendant GOSSELIN N.V. or defendant PASHA.

11. During the relevant period, defendant GOSSELIN N.V., through various subsidiaries and affiliated companies, including GOSSELIN GMBH a company majority owned by defendant GOSSELIN N.V., provided local agent services in Germany.

12. Defendants GOSSELIN N.V. and PASHA offer their freight forwarded customers a "landed rate" - a single rate which combines or bundles origin services, foreign port services and ocean freight and includes a mark-up. To offer this landed rate, defendants GOSSELIN N.V. and PASHA subcontract with other service providers. Defendants GOSSELIN N.V. and PASHA negotiate the landed rate with their freight forwarder customers in advance of each ITGBL filing.

13. Under the ITGBL program, freight forwarders file rates with MTMC twice a year in a two-step bidding process. The rates filed are expressed in U.S. dollars per hundredweight ($/cwt) and are specific to particular "channels." Channels are routes to or from a particular state, or portion of a state, and a specific foreign country (e.g. Germany-Virginia). Of the channels between Germany and the United States, a majority of military household goods "tonnage" moves to and from twenty "high-volume" states. Virginia, with large Army bases such as Ft. Myer and Ft. Belvior, is a high-volume state in the ITGBL program.

14. Each rate submission covers a six-month cycle. The summer cycle runs from April 1 through September 30; the winter cycle runs from October 1 through March 31. The ITGBL cycles are referred to by the abbreviation, "IS" for International Summer or "IW" for International Winter, combined with the relevant year. Thus, "IS-02" is shorthand for the international summer cycle running from April 1, 2002 through September 30, 2002.

15. For each rate cycle, MTMC receives two sets of prices from the U.S. freight forwarders. The first step of the rate filing process, "the initial filing," occurs about four months before a cycle begins, at which time the freight forwarders file initial rates in each channel eastbound and westbound. The forwarders may either file a low rate or an "administrative high" rate in order to preserve their right to match the low rates in the second phase of the rate filing process.

16. After the initial filing, MTMC publishes the lowest five ("low-5") rates offered in each channel and the identity of the freight forwarder filing those low-5 rates. The lowest rate initially bid for a channel is the "prime through rate." The second lowest rate is the "second-low level." In the second phase of the rate filing process, every forwarder that filed any rate in the initial filing has the opportunity to match or "me-too" the prime through rate or to file any rate higher than the prime through rate for each individual channel.

17. Over the course of a cycle, the vast majority of the shipments in each channel moves at the prime through rate. Thus, a freight forwarder must typically me-too the prime through rate in a given channel in order to receive shipments.

18. On or about November 8, 2001, a U.S. freight forwarder filed with MTMC initial rates for ITGBL shipments from Germany to the United States for the IS-02 cycle. That U.S. freight forwarder was not using a landed rate offered by either defendant PASHA or defendant GOSSELIN N.V., but obtained its ocean freight through defendant PASHA, as a co-agent of ISA. In mid-December 2001, MTMC published the low-5, which indicated that this U.S. freight forwarder had set prime through rates for 26 traffic channels from Germany to the United States. In 12 of these channels, there were approximately $3.00 per hundredweight difference between the prime through rate and the second-low level.

19. The deadline for U.S. freight forwarders to file me-too or matching rates with MTMC was January 16, 2002.

20. On December 26, 2001, the managing director of defendant GOSSELIN N.V. sent to a high ranking executive of a competitor landed rate provider and local German agent, an email spreadsheet identifying 12 of those 26 prime through rates filed by the U.S. freight forwarder described in Paragraph 18 for the IS-02 cycle. In this email, the managing director of defendant GOSSELIN N.V. wrote, "If you'll look at the enclosure [spreadsheet] you'll see that with 12 states (of which several are volume states) not taking the low into consideration we would increase the rate level with an average of 3.63 Usd or aprox [sic] 8DM. This is the only thing that in my mind can happen." The e-mail string reflects that the competitor executive replied to defendant GOSSELIN N.V. on December 26, 2001, as follows: "[A]gree to your position. . . . You know if we do not react and give [the] industry a clear message which rate to base m/2 on, then everyone will use the low rate and later expect us to reduce our rates so those carriers can work under their m/2 rates."

21. On or about December 27, 2001, the managing director of defendant GOSSELIN N.V. sent an email and the same spreadsheet to the president of defendant PASHA. In that email, he wrote, "See hereafter some email exchanges between [the competitor executive described in paragraph 20] and myself. Also the file where i [sic] sorted out 12 states set by [the U.S. freight forwarders described in paragraph 18] with quite some money on the table. (Cfr. [Similar] situation last summer) I don't know where you are at this moment with [another freight forwarder that filed prime rates in Germany to U.S. channels], but what rate levels would you be able to support if those states would go to the second level? I think it is important we can move rather quickly now. Maybe when you have a chance we can talk in the next days."

22. By letter of agreement dated January 8, 2002, 12 of the largest German agents, including GOSSELIN GMBH, through its managing director (who is also the managing director of GOSSELIN N.V.), agreed that they would not "handle business" for the freight forwarders in the 12 channels unless the freight forwarders submitted me-too bids at the second-low level or above. On that same day, the managing director of GOSSELIN N.V. also signed an agreement to pay the German agents a specified rate in the 12 channels provided that the shipments moved in those channels at the second-low level.

23. On January 8, 2002, a general agent in Germany for certain U.S. freight forwarders ("the general agent"), drafted a telefax addressed to "All Carriers." Before it was distributed, the general agent sent a copy of the draft telefax to the managing director of defendant GOSSELIN N.V. , who revised the letter. The general agent made the managing director's suggested changes to the telefax, which, as edited, read: "Therefore, the feed back from all agents I have talked to is that they will offer their capacity only to those carriers

me-tooing the second rate level into the following states: US24, US25, US30, US40, US44, US49, US58, US62, US66, US68, US76, US79. It was emphasized strongly that business to these states will only be handled at the second low rate level, so, me-too can only happen at this level." Defendant GOSSELIN N.V. sent a copy of this telefax to defendant PASHA on January 9, 2002.

24. Defendants GOSSELIN N.V. and PASHA and their co-conspirators agreed to eliminate the competitively filed prime through rates in 12 of the 26 channels referenced in Paragraph 18 from Germany to the United States for the IS-02 cycle, including the channel from Germany to Virginia and to replace those 12 prime through rates with higher rates to be filed at the second-low level, with the intent to decrease the through rates paid by DOD.

25. Defendants GOSSELIN N.V. and PASHA agreed with the co-conspirator U.S. freight forwarder described in Paragraph 18 that the freight forwarder would cancel its prime through rates in the 12 specific channels, if no other freight forwarder me-tooed those prime through rates or filed any rate below the second-low level.

26. Defendants GOSSELIN N.V. and PASHA then contacted, through interstate and foreign wires and electronic mail messages, co-conspirator U.S. freight forwarders and directed those co-conspirator U.S. freight forwarders no to me-too the prime through rates in those 12 specific channels and instead, to file me-too through rates at the second low level or higher in these 12 specific channels. Defendants GOSSELIN N.V. and PASHA distributed the general agent's telefax described in Paragraph 23 to most of those co-conspirator U.S. freight forwarders.

27. During these contacts with U.S. freight forwarders, defendants GOSSELIN N.V. and PASHA

obtained the agreement that most of these co-conspirator U.S. freight forwarders would file me-too through rates at the second-low level or higher in the 12 specific channels.

28. Consistent with the direction given by defendants PASHA and GOSSELIN N.V., with few exceptions, co-conspirator U.S. freight forwarders filed me-too rates at or above the second-low level in the 12 specific channels, including the channel from Germany to Virginia.

29. Defendants GOSSELIN N.V. and PASHA and their co-conspirators then agreed that U.S. co-conspirator freight forwarders that filed a rate lower than the second-low level in any of the 12 specific channels would cancel those rates. Consistent with this agreement, defendants GOSSELIN N.V. and PASHA directed particular co-conspirator U.S. freight forwarders to cancel competitively filed me-too rates in some of the 12 specific channels.

30. Co-conspirator U.S. freight forwarders that had filed one or more rates lower than the second-low level in any of the 12 specific channels filed rate cancellations directly with the MTMC, located in the Eastern District of Virginia.

31. In order to ensure that no shipments were tendered to U.S. freight forwarders that had filed below the second-low level in the 12 specific channels, as described in Paragraphs 29 and 30, defendants GOSSELIN N.V. and PASHA and their co-conspirators provided misleading information to DOD personnel in Germany.

32. A substantial percentage of military household goods in the 12 channels moved at the second-low level or higher in the IS-02 cycle. As a result, DOD's costs to transport military household goods were greater than they would have been had the shipments moved at the prime

through rates. A portion of the military household goods shipments affected by the conspiracy included shipments destined for Ft. Myer, Ft. Belvior and other locales within the Eastern District of Virginia.

33. The activities undertaken by defendants GOSSELIN N.V. and PASHA and their co-conspirators during the IS-02 cycle resulted in an increase in the rates paid by DOD for the transportation of military household goods in the 12 specific channels. TO transport military household goods in the specific channels, DOD paid approximately $1 million more than what it would have paid absent defendant PASHA's and defendant GOSSELIN N.V.'s activities.

34. During the relevant period, rates, proposals, contracts, invoices for payment, payments and other documents essential to the provision of ITGBL services were transmitted in interstate and foreign trade and commerce between and among offices of defendants GOSSELIN N.V. and PASHA located in various States and foreign countries.

35. During the relevant period. Defendants GOSSELIN N.V. and PASHA transported, or arranged for the transportation of, substantial quantities of military household goods, in a continuous and uninterrupted flow of interstate and foreign commerce, from Germany to the United States, through various U.S. ports and States, and ultimately to final destinations in various States.

36. During the relevant period, DOD paid for ITGBL services by check, wire transfer, and other monetary instruments transmitted to the bank accounts of co-conspirator U.S. freight forwarders in a continuous and uninterrupted flow of interstate commerce.

37. Defendants GOSSELIN N.V. and PASHA received payments from co-conspirator U.S. freight

forwarders in a continuous and uninterrupted flow of interstate and foreign trade and commerce for services provided as part of the ITGBL transportation of military household goods.

38. The activities of defendants GOSSELIN N.V. and PASHA in connection with the transportation of military household goods were within the flow of, and substantially affected, interstate and foreign trade and commerce.

39. The activities described above were carried out, in part, within the Eastern District of Virginia.

40. The facts described above establish that during the relevant period, defendants GOSSELIN N.V. and PASHA and their co-conspirators entered into and engaged in a combination and conspiracy to eliminate competition by fixing and raising through rates filed with DOD for the transportation of military household goods from Germany to the United States.

41. The facts described above establish that during the relevant period defendants GOSSELIN N.V. and PASHA and their co-conspirators did unlawfully, willfully and knowingly combine, conspire and agree to defraud the United States by increasing the rates paid by DOD for the transportation of military household goods during the IS-02 cycle to levels higher than would have prevailed in the absence of their conspiracy.

(4)

No. 05-677

In the Supreme Court of the United States

GOSSELIN WORLD WIDE MOVING, N.V. AND THE PASHA GROUP, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that Section 7(a)(4) of the Shipping Act of 1984, 46 U.S.C. App. 1706(a)(4), which grants antitrust immunity to "any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade," does not immunize an agreement to fix the through rates bid by United States freight forwarders to the Department of Defense for the door-to-door shipment of military and civilian household goods from points in Germany to points in the United States.

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In the Supreme Court of the United States

No. 05-677

GOSSELIN WORLD WIDE MOVING, N.V. AND THE PASHA GROUP, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 411 F.3d 502. The opinion of the district court (Pet. App. 25a-54a) is reported at 333 F. Supp. 2d 497.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 2005. A petition for rehearing was denied on July 12, 2005 (Pet. App. 55a-56a). On September 22, 2005, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including November 25, 2005, and the petition was filed on November 23, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In accordance with a conditional plea agreement, petitioners moved to dismiss an information charging them with one count of conspiring to fix the prices that the Department of Defense (DOD) paid for the shipment of military and civilian household goods from Germany to the United States, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and one count of conspiring to defraud the United States, in violation of 18 U.S.C. 371. The parties submitted a stipulated factual record. Pet. App. 57a-67a. The district court dismissed the Sherman Act count, holding that the challenged agreement is immune from prosecution under the Shipping Act of 1984 (Shipping Act), 46 U.S.C. App. 1701 *et seq.* Pet. App. 40a-50a, 53a. The court denied the motion to dismiss the fraud count. *Id.* at 50a-52a, 53a. Petitioners then entered guilty pleas to the fraud count and were sentenced in accordance with the plea agreement. On cross-appeals, the court of appeals reversed the dismissal of the Sherman Act count, affirmed the judgment of conviction on the fraud count, and remanded for resentencing. *Id.* at 1a-24a.

1. DOD procures transportation services for the movement of household goods of its military and civilian personnel to and from foreign countries through the International Through Government Bill of Lading (ITGBL) program. DOD administers that program through the Surface Distribution Deployment Command (formerly the Military Traffic Management Command) in Alexandria, Virginia. Pet. App. 58a.

DOD solicits bids for through rates from United States freight forwarders, which are companies that contract with DOD and shoulder the ultimate responsi-

bility for shipment. Pet. App. 58a. "Through rates" are the rates bid by U.S. freight forwarders (in dollars per hundredweight) for all the moving and transportation services provided in the door-to-door move from the foreign country to the United States. *Ibid.* The bidding occurs twice a year for six-month cycles (summer and winter) in a two-step bidding process. *Id.* at 60a-61a. In the first step, or "initial filing," U.S. freight forwarders file a through rate for each route—called a "channel." *Id.* at 61a. The low bidder sets the "prime through rate" for that channel, and thereby captures the percentage of the household goods traffic that DOD reserves for the freight forwarder setting the prime rate. The second lowest rate in the initial filing is termed the "second-low rate." In the second step of bidding, the other freight forwarders can match, or "me-too," the prime through rate or can file a higher rate. Typically, a freight forwarder must me-too the prime rate to receive business in that cycle. *Ibid.*

A through rate bid comprises a single rate for five services: (1) origin (local German) agent services; (2) European port agent services; (3) ocean transport services; (4) U.S. port agent services; and (5) U.S. destination agent services. Pet. App. 58a. As subcontractors for U.S. freight forwarders, petitioners Gosselin World Wide Moving N.V. (Gosselin), a Belgian corporation, and The Pasha Group (Pasha), a U.S. corporation, offer a "landed rate," which bundles the local German agent services, European port services, and ocean services, and includes the landed rate provider's mark-up. It thus reflects the handling of the shipment from its German origin to the U.S. port of destination. Petitioners also act as the exclusive co-agents of the International Shippers' Association (ISA), an association of freight for-

warders organized to consolidate household goods for shipment on ocean-going vessels. *Id.* at 57a, 59a-60a. U.S. freight forwarders buy ocean carriage from petitioners, either as part of the landed rate or as a separate service as agents of ISA. *Id.* at 59a-60a. Additionally, Pasha participates in the ITGBL program as a freight forwarder through its wholly-owned subsidiary, Gateways International, Inc., *id.* at 57a-58a, and Gosselin provides local agent services in Germany through its subsidiary, Gosselin GmbH, *id.* at 60a.

Petitioners admitted that, for the summer cycle of 2002, they agreed with U.S. freight forwarders to raise the through rates filed by U.S. freight forwarders in 12 channels from Germany to the United States. Pet. App. 62a-67a. In the initial filing for that cycle, a U.S. freight forwarder, referred to as "FF-1" in the information, filed prime through rates (*i.e.*; submitted the lowest bid) in 26 of the 52 channels from Germany to the United States. FF-1 did not use the landed rate provided by either petitioner but, by negotiating separately with various subcontractors for each step in the transportation, was able to bid through rates that were approximately $3 per hundredweight lower than those of freight forwarders using petitioners' landed rates in 12 of the 26 channels. *Id.* at 62a. In December 2001, DOD published FF-1's prime bids and those of the next four lowest bidders. U.S. freight forwarders then had until January 16, 2002, to file their second-round me-too bids. *Ibid.*

On December 26, 2001, Gosselin's managing director sent an email to a landed rate competitor (an unindicted co-conspirator (UCC), that, like Gosselin, also operated a local German agency), identifying the 12 channels of concern to Gosselin and stating that, by "not taking the low into consideration we would increase the rate level

with an average of 3.63 Usd * * *. This is the only thing that in my mind can happen." Pet. App. 62a. The head of UCC replied: "[A]gree to your position. . . . You know if we do not react and give [the] industry a clear message which rate to base m/2 [me-too] on, then everyone will use the low [prime] rate and later expect us [the landed rate providers] to reduce our rates so those carriers can work under their m/2 rates." *Ibid.*

Gosselin promptly forwarded those emails to the chief executive of Pasha, the remaining landed rate provider in the United States. In that email, Gosselin's managing director noted the 12 targeted channels "with quite some money on the table." Pet. App. 63a. He stated: "I don't know where you are at this moment with [another freight forwarder that filed prime rates in Germany to U.S. channels], but what rate levels would you be able to support if those states would go to the second level? I think it is important we move rather quickly now. Maybe when you have a chance we can talk in the next days." *Ibid.* Pasha thereafter agreed with Gosselin to eliminate the prime through rates in 12 of the 26 channels and replace them with higher rates at the second-low level. *Id.* at 64a.

To implement the agreement, Gosselin's managing director agreed to pay a specified rate to 12 of the largest German packing and hauling agents (including its own subsidiary, Gosselin GmbH) for origin (local German) services. Pet. App. 63a. In return, a German agent sent to U.S. freight forwarders a fax letter, dated January 8, 2002, that had been edited and approved by Gosselin's managing director. *Ibid.* The fax informed U.S. freight forwarders that German agents "will offer their capacity only to those carriers me-tooing the second rate level into the [enumerated 12] states * * *. It

was emphasized strongly that business to these states will only be handled at the second low rate level, so, me-too can only happen at this level." *Id.* at 63a-64a. Gosselin sent a copy of this fax to Pasha on January 9, 2002. *Id.* at 64a.

Petitioners also agreed with FF-1 that FF-1 would cancel its prime rates in the 12 targeted channels, on the understanding that no other U.S. freight forwarder would me-too those prime through rates or file a rate below the second-low level. Pet. App. 64a. To keep their promise to FF-1, petitioners directed the other U.S. freight forwarders not to me-too the prime through rates in those 12 channels, but instead to file me-too rates at or above the second-low level. *Ibid.* The other U.S. freight forwarders agreed, and most of them filed me-too through rates at or above the second low level in the 12 targeted channels. *Id.* at 65a. In the few instances in which a U.S. freight forwarder ignored or misunderstood the instructions and filed me-too rates lower than the second-low level, petitioners persuaded them to cancel those lower rates. *Ibid.* In addition, before the cancellations were effective, petitioners provided misleading information to DOD personnel in Germany to ensure that DOD did not tender any shipments to a freight forwarder with a me-too rate on file below the second-low level. *Ibid.*

2. The government charged petitioners by information in the Eastern District of Virginia, where DOD is located. Petitioners admitted that the conduct at issue constituted a conspiracy to eliminate competition by fixing and raising through rates filed with DOD and that they unlawfully, willfully, and knowingly conspired to defraud the United States. Their conspiracy increased the rates paid by DOD for the transportation of military

household goods during the summer 2002 cycle by more than $1 million over what DOD would have paid in the absence of the conspiracy. Pet. App. 66a.[1]

Petitioners' conditional plea agreement permitted them "to make only one argument in support of their motion to dismiss: that the conduct set forth in the statement of facts 'is immune from prosecution under the [Shipping Act.]'" Pet. App. 7a. Petitioners presented that argument to the district court, which dismissed the antitrust count based on its construction of Section 7(a)(4) of the Shipping Act, 46 U.S.C. App. 1706(a)(4). Section 7(a)(4) provides antitrust immunity for "any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade." 46 U.S.C. App. 1706(a)(4).

The district court focused its analysis on the foreign aspects of petitioners' business activities, rather than on the through rate agreement itself. The court found that petitioners provided some "local agent service," Pet. App. 41a, a factual premise that was not true for Pasha, see *id.* at 57a-58a, 60a. The court then held that "a basic reading of the statute concludes [*sic*] that Defendants' *business* 'concerns' the foreign inland segment." *Id.* at 44a (emphasis added); see *id.* at 44a-45a ("Defendants' behavior did concern a foreign inland segment of through transportation."). The court reasoned that

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[1] Petitioners incorrectly contend that the government engaged in "manifest forum shopping" (Pet. 2) by charging them in the Eastern District of Virginia. The investigation in this case began before petitioner Gosselin's managing director came to Hawaii for a trade conference, and it was commenced in the Eastern District of Virginia because the victim of the charged conspiracy—DOD—is located in that district.

"[d]efendants' conduct" did not have to relate "exclusively" or "significantly" to the foreign inland segment because Congress had not defined the term "concern" in the Shipping Act or indicated whether it should be given a broad or narrow scope. *Id.* at 45a. That "ambiguity," the court stated, required a construction in favor of petitioners. *Ibid.* The court held, however, that the Shipping Act provided no immunity under the federal fraud statute, and it refused to dismiss count two of the information. *Id.* at 50a-52a.[2]

3. The court of appeals reversed the district court's dismissal of the antitrust count. It held that a through rate agreement does not come within the plain meaning of Section 7(a)(4) because it is an agreement to fix "door-to-door rates, not just rates for the 'foreign inland segment' of the routes." Pet. App. 11a-12a. The court rejected petitioners' reliance on *United States* v. *Tucor International, Inc.*, 35 F. Supp. 2d 1172 (N.D. Cal. 1998), aff'd, 189 F.3d 834 (9th Cir. 1999).[3] It observed that, unlike the conduct at issue in *Tucor*, petitioners' activities did not occur entirely outside the United States. Rather, petitioners "took additional steps to perfect their bid-rigging plan," Pet. App. 12a, by having U.S. freight forwarders submit rigged bids to DOD. *Id.* at 12a-13a. Petitioners' agreement with FF-1 and the

[2] The district court also held that petitioners' conduct was immunized by two other sections of the Shipping Act—Section 7(a)(2) and (c)(1), 46 U.S.C. App. 1706(a)(2) and (c)(1). See Pet. App. 46a-50a. The court of appeals rejected the district court's interpretation of those statutory provisions, *id.* at 14a-20a, and petitioners do not seek review of that portion of the court of appeals' decision in this Court.

[3] See *United States* v. *Tucor Int'l, Inc.*, 238 F.3d 1171 (9th Cir. 2001) (rejecting *Tucor* defendants' Hyde Amendment claims for attorneys fees).

other U.S. freight forwarders related to through rates and "had little to do with the German inland segment of the through services that these forwarders offered." *Id.* at 13a. Furthermore, when some of the freight forwarders "broke ranks," petitioners' measures to "rei[n] them in" were intended "to secure withdrawal of the competitive through rate bids the forwarders had filed in the second round, not to have consequences for the foreign inland segment." *Ibid.*

The court also reasoned that "a broad immunity of the sort that [petitioners] seek would threaten to excise antitrust liability from the through transportation market completely," because "any firm operating in any segment of any through transportation channel need only execute an agreement with a local moving agent to shield itself from the antitrust laws entirely." Pet. App. 13a. Because the activity for which petitioners sought immunity was not regulated by the Federal Maritime Commission (FMC)—the agency charged with enforcing the Shipping Act—the "upshot of [petitioners'] interpretation of § 1706(a)(4) would therefore be a through transportation market beset with collusive and artificially inflated bids, detrimental to consumers and noncooperating competitors alike." *Id.* at 14a. The court thought it "unlikely that Congress intended such dismaying effects, but if there is any doubt over whether § 1706(a)(4) affords defendants relief, it is settled by the maxim that exceptions to the antitrust laws should be construed narrowly." *Ibid.* (citing *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 732-733 (1973)).[1]

[1] The court of appeals did "not address the government's alternative contention that the agreements for which [petitioners] seek immunity are beyond the coverage provisions of the Shipping Act and likewise beyond the FMC's jurisdiction. *See* [46 U.S.C. App.] 1703; *see also*

Because the court of appeals found no antitrust immunity under the Shipping Act for the conduct charged, the court did not reach the question whether such immunity would have extended, as petitioners urged, to immunize their conduct under the federal fraud statute as well. Pet. App. 21a.[5]

ARGUMENT

Petitioners contend (Pet. 11-29) that the court of appeals erred in holding that petitioners' bid-rigging scheme is not entitled to antitrust immunity under the Shipping Act. That decision does not conflict with any decision of this Court or of another court of appeals, including the Ninth Circuit's decision in *United States* v. *Tucor International, Inc.*, 189 F.3d 834 (1999), and it does not present any issue warranting this Court's review.

1. Contrary to petitioners' contention (Pet. 12), the court of appeals' decision does not create "a square conflict" with the Ninth Circuit's decision in *Tucor*. Section 7(a)(4) provides antitrust immunity for agreements "concerning *the foreign inland segment* of through transportation." 46 U.S.C. App. 1706(a)(4) (emphasis added). The conduct charged in *Tucor* and found immune from prosecution was an agreement among local Philippine agents to fix the *inland rate* they charged to U.S. freight forwarders for the Philippine *segment* of through transportation. 35 F. Supp. 2d at 1185. Para-

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Tucor, 189 F.3d at 837 (discussing a similar argument made in that case)." Pet. App. 20a n.3.

[5] The court rejected petitioners' challenges to the factual basis for their fraud conviction, concluding that the facts to which petitioners had stipulated established a factual predicate for fraud. Pet. App. 21a-23a. That holding is not challenged here.

graph 4(a) of the *Tucor* indictment charged a conspiracy among Philippine truckers to fix the prices "to be *paid by* U.S. freight forwarders for moving services" to the local agents. C.A. App. 83 (emphasis added).[6]

The decisions in *Tucor* emphasized that the indictment alleged an agreement involving activities that occurred "exclusively" and "entirely" within the Philippines—foreign inland transportation. 35 F. Supp. 2d at 1183, 1185; 189 F.3d at 835-836; 238 F.3d at 1176. Moreover, the U.S. freight forwarders in *Tucor* were *victims* of a local agents' scheme to raise rates for the local segment of a through rate, not co-conspirators in an agreement to raise through rates.[7]

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[6] Petitioners claim that "[i]n *Tucor*, the United States alleged that foreign carriers operating in the Philippines conspired with others to suppress competition *by fixing prices for the transportation of military household goods between the Philippines and the United States.*" Pet. 6 (emphasis added). In fact, Paragraph 2 of the *Tucor* indictment charged a conspiracy "to suppress competition by fixing prices for moving services *supplied in connection with* the transportation of military shipments of household goods between the Philippines and the United States." 35 F. Supp. 2d at 1175 (emphasis added) (correctly quoting the indictment). Paragraph 3 additionally specifies that both U.S. freight forwarders and DOD were victims of the conspiracy "among the defendants and co-conspirators" charged in the *Tucor* case to increase prices. C.A. App. 82. In this case, U.S. freight forwarders were participants in the conspiracy to fix through rates, and not, as in *Tucor*, the victims of a local agency conspiracy.

[7] Subparagraph 4(c) of the *Tucor* indictment charged that the defendants and co-conspirators caused the U.S. freight forwarders to cancel the low rates filed with DOD because they could no longer honor them when their costs for the foreign inland segment increased, C.A. App. 83, but that cancellation of rates was simply a practical consequence of the agreement. There is no allegation in the indictment that the U.S. freight forwarders had joined the conspiracy, which was intended to "increase to U.S. freight forwarders and the United States

The Ninth Circuit expressly recognized the importance of that distinction:

> "[T]hrough transportation" * * * includes all of the interrelated segments from the point of origin in the Philippines to the service person's new home in the U.S., though provided by different carriers along the way. The defendants are motor carriers operating entirely within the Philippines. For their part of the "through transportation," they packed, picked up, and trucked household shipments from Subic Naval Base and Clark Air Force Base, both in the Philippines, to a Philippine seaport. That is where the defendants' involvement ended.

189 F.3d at 836.

By contrast, the charged conduct in this case was an agreement between petitioners and U.S. freight forwarders to fix through rates charged *by* U.S. freight forwarders to DOD. The price fixing was not limited to a foreign segment of the transportation. Rather, the U.S. freight forwarders carried out their role in the conspiracy by submitting rigged bids to DOD for transportation services that included segments of transportation in the United States, rather than a segment entirely within some foreign country, as in *Tucor*.

Petitioners claim that the German agents in this case, like the truckers in *Tucor*, "reached an agreement among themselves to raise the prices that they receive." Pet. 13. The stipulated facts in this case, however, show that Gosselin agreed "to pay the German agents a specified rate in the 12 channels provided that the shipments moved in those channels at the second-low level." Pet. App. 63a. The German agents, in turn, threatened to

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Department of Defense the prices paid for moving services." See C.A. App. 82 (*Tucor* Indictment para. 3).

boycott "freight forwarders in the 12 channels unless the freight forwarders submitted me-too bids at the second level or above." *Ibid.* Nothing in the factual stipulation indicates that the German agents did anything more than accept Gosselin's offer to pay them more in exchange for their support of its attempt to raise through rates by conspiring with Pasha and the U.S. freight forwarders to submit rigged bids to DOD during the second round of bidding.[8]

The court of appeals correctly recognized that petitioners initiated the through rate agreement and then used the local German agents to ensure its efficacy through the boycott letter that Gosselin's managing director helped to draft. Pet. App. 62a-64a; see *id.* at 5a-6a (the conspiracy was initiated when "Gosselin was evidently alarmed that FF1 had been able to low-bid for the twelve channels without using Gosselin's landed rate"); see also *id.* at 31a-32a. Gosselin's managing director conferred with Pasha and UCC about raising the me-too rates before he helped prepare the boycott letter, and he promised to pay the agents a specified fee in return for their agreement to go along with the boycott. *Id.* at 5a-6a, 31a-32a. Petitioners then persuaded FF-1 to agree to withdraw its prime through rate and "secured [agreement] from other U.S. freight forwarders to file bids at or above the second low level," all of which "had little to do with the German inland segment of the through services these forwarders offered." *Id.* at 13a.

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[8] Indeed, the district court criticized petitioners for arguing beyond the stipulated facts, stating that "the additional facts that [petitioners] supply, concerning an initial price-fixing agreement among German agents" are "outside the factual record and this Court cannot consider them." Pet. App. 39a-40a.

The court of appeals correctly recognized that *Tucor* involved a distinctly different factual situation, that the holding of *Tucor* was limited to those specific facts, and that *Tucor* did not prevent the court from applying the plain language of the Shipping Act to the facts of this case. Pet. App. 12a-13a.

2. The court of appeals' decision is consistent with the plain language of Section 7(a)(4), which does not provide a blanket antitrust exemption for through rate agreements. Section 7(a)(4) exempts only those "agreement[s] or activit[ies] concerning *the foreign inland segment* of through transportation." 46 U.S.C. App. 1706(a)(4) (emphasis added). Petitioners argue that, because Congress did not expressly limit immunity to agreements that "solely" or "only" concern the "foreign inland segment of through transportation," the exemption must apply more broadly to agreements concerning through rates that merely include a foreign inland segment. But Congress did not have to say "solely" to make its intentions clear. Section 7(a)(4) states the coverage of the immunity Congress intended to provide.

Congress was familiar with through rates, which it defined in Section 3(24) as transportation "between a United States point or port and a foreign point or port." 46 U.S.C. App. 1702(24). And it knew how to exempt an agreement on through rates, as it showed by its grant of immunity in Section 4(a)(1) for vessel-operating common carriers. See 46 U.S.C. App. 1703(a)(1), 1704(a), 1706(a)(1). If Congress had wanted to exempt any and all agreements on through rates that included charges for transportation within a foreign county, it could have easily said so directly. Instead, Congress carefully limited the exemption to agreements concerning "the for-

eign inland segment of through transportation." 46 U.S.C. App. 1706(a)(4).[9]

Petitioners' resort to legislative history is also unpersuasive. Petitioners claim that Congress eliminated the word "solely" from Section 7(a)(4) in the drafting process and thereby indicated its intent to provide immunity beyond the "foreign inland segment." Pet. 17, 24-26. The provision of the 1981 bill that they cite, however, relates to the immunity ultimately enacted as Section 7(a)(3).[10] Petitioners have never claimed immunity under that Section, which immunizes only "any agreement or activity that relates to transportation services within or between foreign countries, whether or not via the United States, *unless that agreement or activity has a direct, substantial, and reasonably foreseeable effect on the commerce of the United States.*" 46 U.S.C. App. 1706(a)(3) (emphasis added). See H.R. Rep. No.

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[9] See *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (citing the "familiar principle of *expressio unius est exclusio alterius,*" which cautions that, when Congress enacts a provision explicitly defining the reach of a statute, it implies that matters not specifically defined are not within the statute's reach); accord *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) ("Congress implicitly excluded a general discovery rule by explicitly including a more limited one.").

[10] Congress spent years considering legislation that it ultimately enacted as the Shipping Act of 1984. The 1981 provision that petitioners cite gave antitrust immunity to "any agreement or activity that relates solely to transportation services *between foreign countries.*" S. 1593, 97th Cong., 1st Sess. § 8(a)(4) (1981) (emphasis added). That provision remained in the committee bill reported out in 1982, although it was expanded to cover agreements on transportation "within" as well as "between" foreign countries. S. 1593, 97th Cong., 2d Sess. § 8(a)(4) (1982).

53, 98th Cong., 1st Sess. Pt. 2, at 32-33 (1983); H.R. Conf. Rep. No. 600, 98th Cong., 2d Sess. 37 (1984).[11]

Section 7(a)(4) has separate origins. It first appeared as Section 8(a)(7) of the 1982 committee bill, and it provided an exemption for "any agreement or activity concerning the inland portion of any intermodal movement occurring outside the United States, though part of transportation provided in a United States import or export trade." S. 1593, 97th Cong., 2d Sess. (1982). It did not change substantively from its initial drafting, and it does not reflect in its language or its legislative history any congressional intent to extend immunity from agreements and activities "concerning the foreign inland segment of through transportation" to any agreement or activity concerning a through rate that includes a foreign inland segment.[12]

The court of appeals also correctly observed that petitioners' interpretation of Section 7(a)(4) would "threaten

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[11] The district court in *Tucor* also confused the history of Section 7(a)(3) with that of Section 7(a)(4). See Pet. 24, citing *Tucor*, 35 F. Supp. 2d at 1181-1182; Pet. 19 (discussing comity).

[12] As already noted (see note 4, *supra*), the court of appeals did not address the government's additional argument that there is no immunity in this case because Section 4 of the Shipping Act, 46 U.S.C. App. 1703, which sets forth the agreements that are covered by the Act, including the agreements to which Section 7 immunity extends, covers only agreements "by or among ocean common carriers" or "among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers." 46 U.S.C. App. 1703(a) and (b). Because no ocean common carrier was a party to the agreement in this case, the agreement was not covered by the Shipping Act, was not regulated by the FMC, and could receive no immunity under Section 7. See 46 U.S.C. App. 1703-1706; H.R. Conf. Rep. No. 600, *supra*, at 28 ("section [4] states the coverage of the bill," and "[w]hen read in connection with sections 5 and 7, the effect is to remove the listed agreements from the reach of the antitrust laws").

to excise antitrust liability from the through transportation market completely." Pet. App. 13a. Petitioners are incorrect in claiming (Pet. 26) that FMC or foreign regulation fills that gap. To the extent that agreements affecting U.S. commerce are subject to FMC regulation, Congress did grant immunity. See 46 U.S.C. App. 1706(a)(1) and (2). But agreements or arrangements among U.S. freight forwarders setting the rates charged to DOD for the movement of property are not subject to FMC regulation, and foreign regulation is plainly not adequate to protect against an agreement aimed at raising prices charged to a United States agency responsible for the national defense.[13]

Petitioners also claim that "the Court of Appeals began its analysis" of the Shipping Act "on the wrong foot by starting with the interpretive premise that 'exemptions from antitrust laws' should be 'narrowly' construed." Pet. 17. They argue that reliance on that premise is inappropriate in this case because an "ambiguous" statute should not be interpreted to interfere with the sovereign authority of another country and because a court should exercise restraint in interpreting a criminal statute. Pet. App. 17a-18a (quoting *F. Hoffman-*

[13] Petitioners incorrectly assert that "antitrust exemptions already apply to every other segment of the transportation of household military goods." Pet. 25. In fact, no law immunizes agreements among U.S. freight forwarders to fix their through rates, and no law exempts foreign port agents' services, U.S. port agency services, liftvan charges, or foreign general agent services from the antitrust laws. The ICC Termination Act provides limited antitrust immunity for motor carriers to agree on joint rates with different carriers providing different segments of an overall move, but that immunity is coupled with concomitant regulation by the Surface Transportation Board to ensure that the agreements are not unduly restrictive of competition. 49 U.S.C. 13703(a)(2), (3) and (5).

LaRoche Ltd. v. *Empagram S.A.*, 542 U.S. 155, 164 (2004). Those arguments ignore the plain language of the Shipping Act, the facts of this case, and prior decisions of this Court.

There is nothing ambiguous about Section 7(a)(4) of the Shipping Act as applied to the facts of this case. Petitioners entered into an agreement to fix through rates paid by DOD for transportation that occurs in part within the United States; they did not enter into an agreement concerning only transportation within a foreign country or countries. Pet. App. 11a-14a. Petitioners do not claim that their agreement to fix through rates was subject to FMC regulation. Rather, they assert that the Shipping Act gave them antitrust immunity without any of the Act's "regulatory strings attached." *Id.* at 9a. Particularly in light of that sweeping claim, the court of appeals was correct in observing that its interpretation of the plain language of the Shipping Act was supported by this Court's decisions holding that exemptions from the antitrust laws should be strictly construed.[14]

The United States has a strong sovereign interest in protecting the competitive process that DOD uses to select companies that provide services supporting national defense activities, a process that does not inter-

[14] See, *e.g.*, *Seatrain Lines*, 411 U.S. at 733 (construing the 1916 Shipping Act); *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 216 (1966) ("the implementation of rate-making agreements which have not been approved by the Federal Maritime Commission is subject to the antitrust laws"); see also *United States* v. *Borden Co.*, 308 U.S. 188, 206 (1939) (no antitrust immunity under the Agricultural Marketing Agreement Act of 1937, ch. 296, 50 Stat. 246, or the Capper-Volstead Act, 7 U.S.C. 451 *et seq.*, for conduct unregulated by Secretary of Agriculture).

fere with the sovereign authority of Germany. The United States is prosecuting "*domestic* conduct" (Pet. 17) that was carried out in the United States. Petitioners' conspiracy resulted in U.S. companies submitting rigged bids to DOD. That conspiracy affected the shipment of household goods within the United States as the final leg of the door-to-door move from Germany. And that conspiracy affected a quintessentially domestic interest—more than $1 million in overcharges to DOD borne by U.S. taxpayers.

Contrary to petitioners' suggestion (Pet. 17-20), this case bears no similarity to *Empagran*, *supra*. The Court ruled in *Empagran* that foreign plaintiffs could not sue under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a, for injuries sustained "solely" in foreign countries. 542 U.S. at 159. The Court emphasized, however, that "a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury [although] a purchaser in Ecuador could not bring a Sherman Act claim based on foreign harm." *Ibid.*; see *id.* at 165 (application of antitrust laws to foreign anticompetitive conduct that causes injury in the United States is fully consistent with principles of comity). The United States' criminal prosecution in this case, which seeks to protect the American public from anticompetitive conduct, does not interfere with the ability of Germany to investigate and prosecute any conduct by petitioners or their coconspirators that, in Germany's estimation, violates German laws. See *id.* at 170-171.[15]

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[15] Likewise, Germany's investigation and possible prosecution of local German agents does not override the interests of the United States in this case. See Pet. 26. "The German government's demonstrated ability to regulate conduct *within its own borders*," Pet. 27 (emphasis added),

The court of appeals did not "neglect[] the principle that criminal statutes should be narrowly construed." Pet. 20 (citing *Arthur Andersen LLP* v. *United States*, 125 S. Ct. 2129 (2005)). That principle does not trump all other principles of statutory construction. Indeed, in this case, the statute at issue—the Shipping Act— is a civil statute, and, moreover, the rule that antitrust exemptions must be construed narrowly has been applied in both civil and criminal cases. See note 14, *supra* (citing cases). Petitioners do not deny that they violated the Sherman Act if the Shipping Act does not immunize their conduct. This case bears no similarity to *Arthur Andersen*, where the defendant was convicted of obstruction of justice, 18 U.S.C. 1512(b)(2)(A) and (B), and this Court examined the obstruction statute to determine the *mens rea* element of the offense defined in that criminal statute.[16]

Petitioners' suggestions that their reliance on *Tucor* should exempt them from prosecution, Pet. 20, and that they were not given "fair warning" that their conduct was illegal, Pet. 21, cannot be reconciled with the stipulated facts. Nothing in the stipulation or the information—which constitute the complete factual record in

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does not preclude the United States from regulating conduct within its own borders aimed at DOD and harming American taxpayers.

[16] In *Arthur Andersen*, this Court reversed a conviction because the jury was permitted to find the defendant guilty of "knowingly" or "corruptly" persuading another person "with intent" to induce that person to withhold testimony or documents from a judicial proceeding without finding a criminal intent or "consciousness of wrongdoing." 125 S. Ct. at 2134; see *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 434-446 (1978) (*mens rea* is an element of a criminal Sherman Act prosecution). The Court's decision in *Arthur Andersen* does not suggest that the normal rules of statutory construction have no place in criminal prosecutions or in interpreting statutory language.

this case, Pet. App. 57a—suggests that the petitioners knew about or relied on *Tucor* in entering into their agreement to fix through rates. See Pet. 20 (claiming such reliance without record citation). Moreover, any reliance would not have been justified because, as explained above, *Tucor* involved markedly different criminal conduct.

3. There is no merit to petitioners' final suggestion (Pet. 28-29) that, if the Court decides to review the court of appeals' determination that petitioners are not entitled to immunity on the antitrust count of the information, it should also examine whether petitioners are entitled to immunity on the fraud count as well. The court of appeals correctly ruled, and petitioners do not challenge, "that the factual recitations in the plea documents easily" state facts that "constitute an offense under § 371." Pet. App. 22a. If petitioners had wanted to test the government's theory of fraud in this case, they should have refused to enter into a conditional plea bargain agreement limiting the arguments they could make in this case (see p. 7, *supra*), pleaded not guilty, and put the government to its burden of proof at trial. Instead, they admitted facts that established a Section 371 violation and pleaded guilty to that offense. Petitioners should not be relieved of the consequences of their guilty pleas even if this Court decides to review the decision of the court of appeals with respect to the Sherman Act. Cf. *United States* v. *Broce*, 488 U.S. 563, 571 (1989) (voluntary and intelligent plea cannot be challenged based on a relinquished defense, even if defendants

"may believe that they made a strategic miscalculation").[17]

In any event, the Shipping Act's exemptions are expressly limited to the "antitrust laws," which in turn are limited to the antitrust statutes in Title 15. See 46 U.S.C. App. 1702(2), 1706(c)(2). The Shipping Act makes no mention of the federal fraud statute. Accordingly, the express language of the Shipping Act fully supports the district court's conclusion that the statute does not preclude a prosecution for a violation of 18 U.S.C. 371.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[17] Petitioners incorrectly claim (Pet. 28) that "there is no allegation of any separate fraudulent or misleading statements made by the petitioners" apart from the conduct charged in Count One. To the contrary, petitioners stipulated to the fact that, in addition to the price fixing, they conspired to provide misleading information to DOD to ensure that no shipments were tendered to U.S. freight forwarders that had filed me-too rates below the second-low level. Pet. App. 65a.

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IN THE

Supreme Court of the United States

GOSSELIN WORLD WIDE MOVING, N.V.
AND THE PASHA GROUP,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Whether the Fourth Circuit erred in concluding, contrary to the Ninth Circuit and to well-established rules of statutory construction, that an antitrust exemption provided by the Shipping Act of 1984, 46 U.S.C. app. § 1701 *et seq.*, does not apply to activities or agreements relating to the transportation of U.S. military household goods in foreign countries, solely because those activities or agreements also impact the transportation of goods within the United States.

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INTRODUCTION

The Government does not dispute that the Court of Appeals expressed not a whit of concern for the decision's impact upon the antitrust policies of foreign sovereigns, notwithstanding the express direction of *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004) and the actual interference demonstrated here by the amicus brief filed by the Government of Belgium. Nor can the Government ignore the fact that Congress sought to avoid precisely such a conflict of laws by exempting from the antitrust laws "any agreement or activity concerning the foreign inland segment of through transportation." 46 U.S.C. App. § 1706(a)(4).

The Government devotes its brief, instead, to shading the stipulated facts so as to obscure the Fourth Circuit's break with the Ninth Circuit, arguing that the facts here differ from those which the same Department of Justice officials prosecuted and lost in *United States v. Tucor Int'l, Inc.*, 189 F.3d 834 (9th Cir. 1999). No matter how dark the shade of lipstick, however, the Government cannot hide that the case remains the same pig.

The Government portrays *Tucor* as a conspiracy involving solely foreign agents, while this case purportedly involves just "petitioners and U.S. freight forwarders." Yet in *Tucor*, the named defendant was an American company, the charged conduct also occurred in the United States, and the Government in fact claimed that the conspiracy "target[ed] only the United States." Reply Br. for U.S. at 1, 189 F.3d 834 (9th Cir. 1999) (No. 98-10316) (available at 1999 WL 33612244, at *1). In fact, *Tucor*, like this case, involved both foreign and domestic conduct.

As even the Fourth Circuit recognized, the "[t]he first step in this scheme" at issue here was not domestic, but rather "was the agreement with twelve large German local agents to handle no business from forwarders who filed bids

below the second low level," and it was "the success" of that agreement upon which the entire conspiracy depended. App. 11a. The Statement of Facts ("SOF") confirms that just as in *Tucor*, the charged conspiracy concerned an agreement among "12 of the largest German agents, including Gosselin GMBH" to do business only with freight forwarders who filed a certain through rate—an agreement reached before any freight forwarder ever learned about the charged conduct. App. 63a.

The Department of Justice's efforts to obscure this clear split stand sharply at odds with its affirmative maneuvers to avoid the Ninth Circuit. The Government does not dispute that (1) one petitioner is a domiciliary of California, (2) the other's managing director was arrested in Hawaii; and (3) the director's release from custody was *expressly* conditioned on consent to venue in the Eastern District of Virginia. The Government claims that venue was nonetheless proper because the Department of Defense resides in Virginia, but the availability of that venue was hardly what prompted the deliberate efforts to avoid the Ninth Circuit.

Indeed, the Government's ability to move this prosecution to the Eastern District of Virginia demonstrates only that having forum shopped its way to a friendly decision, the Government may bring all future prosecutions there, negating the Ninth Circuit's decision in *Tucor* and avoiding any deepening of the circuit split at issue in this case. Because this case presents the best vehicle for the resolution of the question presented, and because of the foreign relations and fair-notice concerns at issue in this *criminal* prosecution, certiorari should be granted.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CREATES A STARK CIRCUIT CONFLICT.

The Government claims that the decision below creates no conflict with the Ninth Circuit and thus does not warrant

review, because *Tucor* involved the "distinctly different factual situation" of a price-fixing agreement among Philippine agents that was "limited to a foreign segment of the [through] transportation." U.S. Br. 11-14. This case involves the same "factual situation" as *Tucor*: an agreement among foreign agents to fix prices on the foreign inland segment.

1. Despite the Government's shading, the *only* real difference between the two cases lies in when the freight forwarders learned of the foreign agents' agreement. In *Tucor*, the freight forwarders only learned of the agreement after the bidding process was over, and as a result, the low-bid freight forwarders became "victims" because they were forced to cancel their rates with DOD. Cert Petn. 14 n.5. By contrast, here, the foreign agents notified the freight forwarders before bidding ended, allowing all but one of the freight forwarders to submit higher bids in response to the foreign agents' demands. App. 63a-64a.

The Government repeats its "freight forwarder as victim" theory, but nowhere does it explain why this should make any legal difference as to whether an otherwise identical conspiracy is exempt from U.S. antitrust laws.[1] The indictments in *Tucor* and this case both involved an agreement to increase the prices the U.S. government paid for the transportation of military household goods. *Compare* C.A. App. 82 (*Tucor* Indictment ¶ 3) ("The charged combination and conspiracy consisted of a continuing agreement ... among the defendants co-conspirators, *the substantial term of which was to increase to U.S. freight*

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[1] Indeed, even in *Tucor*, the Government recognized that not all freight forwarders were "victims" of the conspiracy, because the two freight forwarders with *high* rates on file *benefited* from the foreign agents' agreement. C.A. App. 83 (¶¶ 4(c)-(d)). Thus, in *Tucor* as well as this case, the freight forwarders served as the means by which the foreign agents obtained higher rates.

forwarders and the United States Department of Defense the prices paid for moving services.") (emphasis added), *with* C.A. App. 24 (*Gosselin* Information ¶ 2) ("The charged combination and conspiracy consisted of a continuing agreement ... among defendants and co-conspirators, *the substantial term of which was to increase the rates paid by DOD for the transportation of military household goods from Germany to the United States.*") (emphasis added).

Contrary to the Government's new-found reading of *Tucor*, that case decidedly was *not* limited to an agreement concerning only the foreign inland segment. The Government not only charged the *Tucor* defendants with seeking to "increase to ... the United States Department of Defense the prices paid for moving services," C.A. App. 82, but it specifically argued that the charged conduct "target[ed] only the United States," Reply Br. for U.S. at 1, 189 F.3d 834. The defendants also included an *American* company, C.A. App. 85 (*Tucor* Indictment ¶9). Indeed, while the Government asserts before this Court that the activity occurred "exclusively" within the Philippines, the Government alleged in *Tucor* that the conspiracy "was formed and carried out, in part, within the Northern District of California." *Id.* at 89 (*Tucor* Indictment ¶ 20). The *Tucor* conspiracy thus involved precisely the same conduct at issue here—an agreement among foreign agents that, even if centered abroad, clearly impacted the through rates paid by DOD. U.S. Br. 12.

Accordingly, the Ninth Circuit's opinion was not limited to price-fixing agreements concerning *only* the foreign inland segment: rather, the Ninth Circuit specifically held that § 1706(a)(4)'s exemption "clearly applies to any agreement—*without limitation*—concerning the foreign inland segment of through transportation." 189 F.3d at 837 (emphasis added). The Government cannot distinguish away this circuit conflict either by relying on the Ninth Circuit's decision or by contradicting its earlier representations in *Tucor*.

2. Just as the Government closes its eyes to the domestic conduct in *Tucor*, it also downplays the foreign conduct here to the point of barely involving the foreign agents at all. *See* U.S. Br. 12 ("[T]he charged conduct in this case was an agreement between petitioners and U.S. freight forwarders to fix through rates charged *by* U.S. freight forwarders to DOD."). According to the Government, "[n]othing in the factual stipulation indicates that the German agents did anything more than accept Gosselin's offer to pay them more in exchange for their support of its attempt to raise through rates ....." *Id.* at 13. That is outright false: the SOF makes clear that the German agents reached agreement before a single freight forwarder even became aware of its existence.[2]

The Government admits that the agreement in this case originated in a conversation between Gosselin's managing director and a "landed rate competitor" that expressed concern over the low bids filed by one of the freight forwarders. U.S. Br. 4-5. What the Government omits from its description, however, is that both the competitor and Gosselin (which wears two hats) were local "German agents," and nothing in the SOF suggests that they were acting as "landed rate competitors." App. 62a, 63a (SOF ¶¶ 20, 22). The email that began the conspiracy voiced the concern of *local German agents* that *rates for German inland services* would be reduced. App. 63a. It was this discussion that led to an agreement among the *local German agents* before any freight forwarder became involved. *Id.*

The Fourth Circuit's decision states with crystalline clarity that "[t]he German agents, for their part, agreed not to

[2] Indeed, it is also false to say that Gosselin "offered to pay them more." This is nowhere supported by the SOF, nor is it true: Gosselin offered to pay the agents their minimum rate, and nothing "more." As the agents themselves knew, unless the business was handled at the second-low rate (the rate the agents demanded), the carriers could not have paid the agents their minimum rates.

handle business from freight forwarders in those channels unless the forwarders submitted me-too bids at the second lowest level (the 'second low') or above." App. 6a; *see also id.* at 63a (SOF ¶ 22). Nothing in the SOF suggests that the foreign agents reached this agreement among themselves in reliance on, or on condition of, anything that petitioners did at all, particularly as to the freight forwarders.

Thus, the conspiracy charged in this case, as in *Tucor*, turned on the foreign agents' agreement to fix the prices charged to DOD. App. at 6a; *see also id.* at 12a ("It is true that defendants' original agreement with the German local agents may have had the relationship to a 'foreign inland segment' that the statute requires."). The only question is whether the Fourth Circuit correctly held that because petitioners "took additional steps to perfect their bid-rigging plan," by communicating the agreement to the freight forwarders, the agreement no longer "concerned" the foreign inland segment. *Id.* at 12a-14a. But this is not a meaningful distinction from *Tucor*, where the defendants also engaged in activity outside the foreign inland segment, and indeed "the substantial term" of their agreement was to increase the through rate. What the Fourth Circuit described as "additional steps" constitute no basis for distinguishing the Ninth Circuit's decision. This case therefore presents an appropriate vehicle for certiorari.

II. THE DECISION BELOW MISCONSTRUES THE SHIPPING ACT.

The Government's defense of the Court of Appeals' statutory holding gets no further than its effort to mask the circuit split. Indeed, it enters the realm of tautology: the decision below "is consistent with the plain language of Section 7(a)(4)" because the statute "does not provide a blanket antitrust exemption for through rate agreements," and "petitioners entered into an agreement to fix through rates." U.S. Br. 14, 18. Never once does the Government identify the "through rate agreement" at issue, and it is a

straw man in this case, which concerns a conspiracy initiated and enforced by local German agents. App. 63a.

1. The Court of Appeals acknowledged the nuances over which the Government now stumbles, accepting that the "first step" in the charged conduct "was the agreement with twelve large German local agents to handle no business from forwarders who filed bids below the second level," and that "the success" of the agreement "depended entirely on the viability of the arrangement defendants had reached with the local German firms." App. 11a. The Court of Appeals nonetheless reversed on the ground that petitioners' "additional step" in communicating the agreement so as to induce the withdrawal of through rates, meant this conduct no longer "concerned" the "foreign inland segment."

The Government repeats the Court of Appeals' conclusion: because petitioners "did not enter into an agreement concerning *only* transportation within a foreign country or countries," U.S. Br. 18 (emphasis added), they are not entitled to immunity. Congress, however, did not exempt agreements that "only" related to transportation within a foreign country, but exempted all agreements that "concerned" the "foreign inland segment."

The Government contends that "Congress did not have to say 'solely' to makes its intentions clear," *id.* at 14, but Congress' intentions are captured by the words of the statute itself. An agreement can "concern" both the foreign inland segment and the through rate as a whole, because concern, like its synonym "relates," is a "highly general" term, which this Court has "interpreted broadly." *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 38 (1996); *see also* Cert. Petn. at 22-23. There is thus no natural sense in which the statute may properly be interpreted to apply to agreements *solely* concerning the foreign inland segment, as the Court of Appeals held. Rather, the Court of Appeals reached its decision because it mistakenly believed itself under an obligation to construe the amendment narrowly.

2. Congress in fact expressly removed the word "solely" from the Shipping Act exemptions, precisely because the foreign shipping industry expressed concern that "the word 'solely' ... could be construed" to exclude "arrangements by conferences or ocean carriers for inland foreign ... transportation in connection with intermodal routes or services." *1981 Shipping Act: Hearing Before Subcomm. On Merchant Marine of the Senate Comm. On Commerce, Science and Transp.*, 97th Cong. 208 (1981).

The Government emphasizes that the word "solely" appeared in the original draft of Section 7(a)(3) of the Shipping Act and claims that both petitioners and "the district court in *Tucor* ... confused" its history "with that of Section 7(a)(4)." U.S. Br. 15 & 16 n.11. There is no such confusion. Following the 1981 hearings, Congress deleted "solely" from Section 7(a)(3) *and* added a separate Section 7(a)(4) to expressly exclude the "inland portion of any intermodal movement occurring outside the United States." S. 1593, 97th Cong., 2d Sess. (1982). The removal of "solely" and the addition of Section 7(a)(4) were not two independent events, but rather a concerted effort to ensure that the very conduct at issue here fell within the exemption.

3. The Government virtually ignores the canons of construction, except to argue that the Court of Appeals had no need for any canon because "[t]here is nothing ambiguous about Section 7(a)(4) of the Shipping Act as applied to the facts of this case." U.S. Br. 18. The Government's refusal to admit any ambiguity begs the question of what "facts" it has in mind, given the foreign agents' principal role in the charged conduct, and given the statute's broad exemption of all agreements "concerning" the foreign inland segment.

a. The Court of Appeals reached a contrary conclusion only because it believed itself bound to construe the antitrust laws narrowly in this criminal case. To the contrary, the canon of construction works precisely in reverse, requiring courts to "exercise[] restraint in assessing the reach of a

federal criminal statute," out of deference to congressional prerogative and the need for "fair warning." *See Arthur Andersen v. United States*, 125 S.Ct. 2129, 2134 (2005) (quotation omitted). The Government asserts that "the rule that antitrust exemptions must be construed narrowly has been applied in both civil and criminal cases," but has identified not one criminal case construing a statutory exemption narrowly. U.S. Br. 20 (citing note 14). So far as petitioners are aware, this Court has *never* applied the rule in a criminal prosecution. *See* Cert. Petn. at 21 & n.6.

The Government further argues that *Arthur Andersen*'s concern for "fair notice" does not apply because the stipulated facts do not provide that petitioners "knew about or relied on *Tucor* in entering into their agreement to fix through rates." U.S. Br. 20-21. Nothing in *Arthur Andersen* requires a criminal defendant to show actual reliance on an alternative interpretation. Rather, "fair notice" presents the objective question of whether a reasonable observer could have believed its conduct lawful. Here, where the statute at a minimum is ambiguous, and the only Court of Appeals to have ruled held that the charged conduct was exempt from the antitrust laws, petitioners plainly have shown an entitlement to a narrow construction of the criminal law.

b. Finally, the Government does not dispute that *Hoffman-La Roche*, 124 S. Ct. at 2366, requires that courts "construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations," and that the Fourth Circuit made no such accommodation here. Yet the Government tries to distinguish the case because of the United States' "strong sovereign interest in protecting the competitive process that DOD uses." U.S. Br. 18. The Government's financial interest is besides the point, however, because it remains the same no matter whether the Government is the direct victim of domestic shippers or an indirect victim of foreign agents. Congress indisputably has determined that out of respect for the sovereignty of foreign nations, a foreign conspiracy—even one that might affect the

Government or U.S. citizens—remains within the exclusive jurisdiction of the foreign antitrust authorities.

The question here is not whether Congress has the power to criminalize the conduct at issue—it clearly could do so. The question rather is whether the *Executive Branch* may override Congress' express judgment to leave this conduct to the regulation of foreign sovereigns. *Hoffman-LaRoche* recognized the conflicts from parallel antitrust enforcement actions: "even where nations agree about primary conduct, say price fixing, they disagree dramatically about appropriate remedies," *Hoffman-LaRoche*, 124 S. Ct. at 2368. In its amicus brief, the Government of Belgium here further explains the manifest conflicts between American and European antitrust laws in its amicus brief. *See also* Cert. Petn. 26-28. The Court of Appeals ignored these comity principles in the decision below, and the Department of Justice has demonstrated, both here and in *Tucor*, that it remains tone deaf to their music as well. To honor the legislative judgment and to avoid future interference with foreign antitrust cases, certiorari is warranted.[3]

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

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[3] The Government opposes certiorari on the fraud count because the SOF supposedly contains independent facts to support the offense, yet the Government never identifies those facts. U.S. Br. 21. Indeed, the SOF states only that petitioners provided "misleading" information to the DOD to "increas[e] the rates paid by DOD." App. 67a. These summary conclusions depend on the illegality of the underlying conspiracy, and thus the charge should stand or fall with the antitrust charge. The Court of Appeals never addressed the issue, but to ensure that it is preserved, petitioners request certiorari over this issue as well. In any event, petitioners would be sentenced separately on the fraud charge. Therefore, even if the Court did not find this issue cert-worthy, it does not pose an independent bar to review.

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No. 05-677

IN THE

Supreme Court of the United States

GOSSELIN WORLD WIDE MOVING, N.V., AND THE PASHA GROUP, PETITIONERS

v.

UNITED STATES, RESPONDENT

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE GOVERNMENT OF BELGIUM AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether provisions in the Shipping Act of 1984, which foreclose the application of U.S. antitrust laws to agreements and activities relating to the transportation of U.S. military household goods in foreign countries, should be interpreted in light of principles of prescriptive comity and the sovereign interests of other nations in regulating their own commerce.

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INTEREST OF *AMICUS CURIAE*

The Government of Belgium has a vital interest in this Court's review of the decision below, which would impermissibly interfere with the prerogative of Belgium and other European nations to regulate anticompetitive behavior within their borders. Belgium itself has a well-developed legal regime designed to protect against abuses of economic competition. Specifically, the Belgian Act on the Protection of Economic Competition ("Belgian Act") prohibits "agreements between undertakings ... and concerted practices whose object or effect is to significantly prevent, restrain or distort competition in the Belgian market concerned or in a substantial part of it." Belgian Act art. 2, § 1. The Belgian Act further prohibits "[a]ny abuse of a dominant position in the Belgian market concerned or in a substantial part of it by one or more undertakings." *Id.* art. 3.[1]

Belgium is also a Member State in the European Union ("EU"). In that capacity, Belgium provides political, economic, and enforcement support for the EU's competition laws, which, in conjunction with Member States' national laws, operate as a dual enforcement system in Europe. The Belgian Act provides for EU enforcement where unlawful restraints on trade fall within the jurisdiction of the European Community ("EC"). And, like Belgium, the EU vigorously prosecutes price-fixing, having levied €1.839 billion in fines during 2001 and €950 million during 2002. See *The Fight Against Cartels: Statistics*, available at http://europa.eu.int/comm/competition/citizen/cartel_stats.html.

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[1] The parties have consented to the filing of this brief; their letters of consent are on file with the Clerk. No counsel for any party has authored this brief in whole or in part, and the Belgian Movers Association has made a monetary contribution to its preparation and submission.

Belgium is likewise a member of the Organisation for Economic Co-operation and Development ("OECD"), which urges its members to coordinate the enforcement of their antitrust laws. In addition, Belgium's Competition Service actively participates in the European Competition Network, the International Competition Network, and the European Competition Authorities. See http://mineco.fgov.be/organization_market/competition/home_en.htm.

For all these reasons, Belgium has significant economic and political interests in ensuring that companies acting in Belgium and other European markets comply with Belgian and EU competition laws, and in preventing encroachment upon those enforcement efforts by other countries' laws. Thus, Belgium has a vital interest in ensuring that Belgian companies such as petitioner Gosselin World Wide Moving, N.V. ("Gosselin") are not subject to unreasonable extraterritorial applications of U.S. antitrust laws, including the Sherman Act, 15 U.S.C. § 1.

STATEMENT

This is a criminal antitrust case in which the United States charges that petitioners violated the Sherman Act, 15 U.S.C. § 1, by engaging in price-fixing in connection with moving services provided to the Department of Defense ("DoD"). Petitioners Gosselin, a Belgian company, and The Pasha Group ("Pasha"), a U.S. company, assert that their activity—the vast majority of which took place on foreign soil and is under criminal investigation by foreign antitrust officials—is immune from prosecution under the Shipping Act of 1984, 46 U.S.C. app. § 1701-1719.

The Government of Belgium agrees with petitioners' arguments, and files this brief to emphasize the importance of the issue presented here to the international community. In particular, this Court's review is urgently needed to prevent the decision below from jeopardizing the antitrust enforcement efforts of foreign authorities such as Belgium

and the European Community. The Fourth Circuit's reading of the Shipping Act undermines their ability to regulate their own commerce in ways that differ from that of U.S. officials. Moreover, foreign firms will be deterred from taking part in those jurisdictions' leniency programs if the firms' admissions can subject them to *criminal liability* in the United States.

A. The International Through Government Bill of Lading Program

Under the DoD's International Through Government Bill of Lading ("ITGBL") program, the Military Traffic Management Command ("MTMC") (now the Surface Deployment and Distribution Command) takes competitive bids from freight forwarders for moving the household goods of DoD personnel. There are five segments of service: (1) the carriage of goods between inland U.S. cities and U.S. ports; (2) U.S. port services; (3) ocean transport services; (4) foreign port services; and (5) the carriage of goods between foreign ports and foreign inland cities. The MTMC, however, takes unitary bids known as "through rates" for the entire process. Pet. App. 3a.

The lowest bid from any freight forwarder for a given route, or "channel," is called the "prime" through rate ("FF1"). The freight forwarder who makes the prime bid gets a set percentage of DoD business for that channel. In a second round of bidding, however, other freight forwarders can match FF1 by providing "me-too" rates. Those who match FF1 get a smaller set percentage of the business for that channel. Pet. App. 3a.

Petitioners are in the business of moving the household goods of DoD personnel from their German homes to ports in the United States. Accordingly, they contract with ocean common carriers and providers of foreign port and inland transportation services (segments 3-5 above) at a rate called a "landed rate." Because the ocean transport rate is set by a

conference of ocean carriers and amounts to a fixed cost, the competitiveness of petitioners' landed rate depends on the rates at which they subcontract with local foreign agents for moving services in the foreign segments (port, storage, and transportation services). Pet. App. 4a.

According to the agreed-upon facts, petitioners admit that in 2001 they agreed to participate with German moving agents in their decision not to service freight forwarders who made "me-too" bids on 12 separate channels. Petitioners informed these freight forwarders that the German agents would not contract with them if they matched the lowest (FF1) rate. When no one else matched its rate, the freight forwarder that submitted the low FF1 rate withdrew it, the other freight forwarders submitted bids at the second lowest rate, and as a result the DoD paid a higher rate for moving services on those 12 channels than it otherwise would have paid if the initial prime rate had held. Pet. App. 31-32a

Petitioners assert immunity from prosecution under the Shipping Act of 1984, which—principally out of respect for the interests of foreign nations—contains several grants of antitrust immunity. Most relevant here, the Shipping Act exempts from Sherman Act liability "any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade." 46 U.S.C. app. § 1706(a)(4).

B. The Decisions Below

The district court dismissed the indictment, primarily on the ground that "under a plain reading of Section 1706(a)(4) of the Shipping Act, Defendants' activity does 'concern' the foreign inland segment of through transportation." Pet. App. 26a. The court rejected the government's argument that § 1706(a)(4) was unavailable simply because the alleged conspiracy involved "contacts with the United States." *Id.* at

43a. Noting that petitioners' alleged activity included coordinating a boycott by local German agents, the court explained that petitioners' conduct did not "need[] to be exclusively—or significantly—relating to the foreign inland segment of through transportation" to "concern" the foreign inland segment within the meaning of the statute. Pet. App. 45a.

The Fourth Circuit reversed, relying heavily on "the principle of narrow construction for antitrust exemptions." Pet. App. 10a. Although the conduct at issue took place primarily overseas, involved foreign agents, and was subject to foreign regulation, the court of appeals "s[aw] no reason to depart" from what it called "ordinary practice" in interpreting the scope of the Act. *Ibid.* In so holding, the court of appeals gave no consideration to foreign nations' interests in regulating foreign commerce. Rather, because petitioners' agreement with the German movers was "aimed at" the entire through transportation market, and because petitioners contacted other U.S. freight forwarders to inform them of the boycott, the court held that petitioners' activities did not "concern" the foreign inland segment of through transportation. Therefore, the exemption did not apply. *Id.* at 11a.

C. Foreign Proceedings Against Gosselin

Meanwhile, petitioners' conduct has not been overlooked by foreign authorities. In Germany, where nearly all the events at issue took place, the Bundeskartellamt ("German Federal Cartel Office" or "Office") opened a formal investigation of Gosselin in 2002. The matter is pending, but the Office has investigated the boycott claims and issued an Interim Decision finding that Gosselin participated in quasi-criminal price-fixing and illegal market area restriction agreements in several regions in connection with moving services for the United States military forces, in violation of German antitrust law. The Office has also proposed to fine Gosselin approximately €2.5

million (roughly $3.02 million at current exchange rates), and has entered similar Interim Decisions as to five other companies who participated in the cartel.

Moreover, if and when the Office proceeds to final decision against Gosselin, it will likely refer the matter to the European Union Competition Commissioner, who has authority to impose further penalties under Articles 81 and 82 of the treaty establishing the European Community, O.J. C 224/1 (1992), at 64-65.[2]

REASONS FOR GRANTING THE PETITION

The court of appeals' decision plainly merits plenary review. Two Terms ago, in *F. Hoffman-LaRoche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164-165 (2004), this Court "caution[ed] courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws," so as to ensure that "the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world." Indeed, the Court in *Empagran* readily acknowledged that "America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs." *Id.* as 165. And the Court instructed that American courts should "ordinarily construe[] ambiguous statutes to avoid unreasonable

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[2] The Office also opened quasi-criminal proceedings against Marc Smet, Chief Executive Officer of Gosselin, for allegedly violating provisions of the German competition law that prohibit price-fixing and area agreements and inciting boycotts. That office ultimately dismissed those proceedings, but on the ground that Smet was the subject of another criminal investigation involving the same activities but brought by prosecutorial authorities in Kaiserlautern, under §§ 263 and 298 of the Criminal Code. That investigation remains pending as well.

interference with the sovereign authority of other nations." *Id.* at 164.

Although *Empagran* is the latest word from this Court on the extraterritorial application of U.S. antitrust laws, the opinion below does not even reference that decision. Instead, the court went to great lengths to conclude that "the traditional canon of narrow construction, applicable to antitrust exemptions generally, applie[s] with full force" to the Shipping Act. Pet. App. 9a. And the court of appeals' "interpretive framework" (*id.* at 10a) gave *no* consideration to foreign sovereigns' interests in ensuring that extraterritorial applications of U.S. antitrust laws do not interfere with the regulation of anticompetitive conduct on foreign soil.

The decision below warrants review for two reasons beyond the circuit conflict noted in the petition. First, as explained below in Section I, the court of appeals' interpretation of the Shipping Act undermines foreign nations' sovereign interests in regulating their own commerce. Price-fixing and other anticompetitive practices are closely regulated by nations such as Belgium, Germany, and the European Community (among others), but the regulatory approaches of these jurisdictions differ markedly from that of U.S. officials. These nations have a powerful interest in deciding for themselves how to regulate such conduct when it occurs within their borders.

Second, as explained in Section II, the court of appeals' interpretation directly threatens the antitrust enforcement efforts of these and other nations. For example, many nations use leniency programs to obtain information about cartels. Yet companies in such jurisdictions will be deterred from taking part in these programs, and from otherwise cooperating with foreign authorities, if their admissions in those jurisdictions can subject them to *criminal liability* in the United States. Indeed, the ongoing German investigation

here confirms that the risk of such "double jeopardy" is real for foreign firms.

For both of these reasons, the question whether the Shipping Act exemptions at issue here extend to *foreign* conduct that most directly concerns *foreign* competitors and nations is of enormous importance to international commerce and diplomacy. If the Act is to be interpreted to upset the balance that Congress struck between domestic and foreign antitrust regulation, such a decision should come from this Court, not from a single court of appeals whose decision conflicts with the Ninth Circuit's decision on the same issue. See *United States* v. *Tucor Int'l, Inc.*, 189 F.3d 834 (9th Cir. 1999).

I. Certiorari Is Warranted Because The Court Of Appeals' Interpretation Improperly Fails To Accord Any Deference To Foreign Sovereigns' Interests.

In adopting its narrow construction of the Shipping Act's exemption of foreign conduct, the court below gave no consideration to foreign nations' interests. As explained below, this approach is contrary to well-settled principles of U.S. and international law. And it ignores the legislative history of the 1984 amendments to the Shipping Act, which demonstrate that Congress was greatly concerned about extraterritorial enforcement of the antitrust laws and the effect of such enforcement on international regulation.

A. United States law and international law and comity establish that U.S. antitrust law must be read with deference to foreign nations' interests.

It is well settled as a matter of both United States and international law that nations should consider the sovereign interests of other nations before exercising their jurisdiction extraterritorially. This principle of "prescriptive comity" informs judicial interpretation of federal statutes: courts must "ordinarily construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of

other nations," because they "must assume[] Congress ordinarily seeks to follow" the "principles of customary international law." *Empagran*, 542 U.S. at 164. The court of appeals did not address these principles, let alone accord deference to the interests of the nations with the strongest interests in regulating the conduct at issue.[3] To the extent that there is any ambiguity in the Shipping Act exemptions,[4] consideration of foreign nations' interests counsels against reading those exemptions narrowly and in a way that excludes from their protection the conduct at issue here.

First, several important factors that should always guide a comity analysis—primacy over the transaction, the locus of the conduct, the locus of the conduct's effects, and the strength of the foreign state's policies on the issue—confirm that foreign interests should predominate here. See, *e.g.*, *Empagran*, 542 U.S. at 165. Apart from petitioners' efforts to inform U.S. freight forwarders of their boycott, virtually all of the conduct at issue took place in Germany. Further, Germany and the European Community already regulate the anticompetitive conduct here—indeed, the German

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[3] See also *id.* at 176 (Scalia, J., concurring in judgment) (endorsing the majority's application of "the principle that statutes should be read in accord[ance] with the customary deference to the application of foreign countries' laws within their own territories"); *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (L. Hand, J.) (U.S. statutes should be interpreted with "regard to the limitations customarily observed by nations upon the exercise of their powers").

[4] We agree with petitioners that the agreements here "concern" the foreign inland segment of the through transportation market, and thus are exempt from antitrust regulation under 46 U.S. app. § 1706(a)(4), without regard to the principle of prescriptive comity. That principle merely confirms—and strongly so—the correctness of petitioners' reading.

authorities propose to fine Gosselin €2.5 million for it. The effect of that conduct, moreover, was felt most immediately by other German moving agents who lost business when the boycott led the low-bidding freight forwarders to abandon their prime and "me-too" bids. Cf. *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 819 (1993) (Scalia, J., dissenting) (citing similar factors as supporting a narrow construction of the Sherman Act under principles of prescriptive comity).

Second, the principle that U.S. laws should be interpreted with deference to the interests of foreign nations applies with particular force in *criminal* cases. As the Restatement (Third) of Foreign Relations Law of the United States explains:

> [I]n the case of regulatory statutes that may give rise to both civil and criminal liability, such as United States antitrust and securities laws, the presence of substantial foreign elements will ordinarily weigh against application of criminal law. In such cases, legislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication.

Section 403, cmt. *f*, at 247. Indeed, because "the exercise of criminal ... jurisdiction in relation to acts committed in another state may be perceived as particularly intrusive," "criminal jurisdiction over activity with substantial foreign elements should be exercised more sparingly than civil jurisdiction over the same activity, and only upon strong justification." *Id.*, reporters' note 8, at 253.

Third, general international law likewise requires respect for foreign nations' interests. For example, the OECD, of which the United States and Belgium are members, urges its members to recognize "the need . . . to give effect to the principles of international law and comity and to use moderation and self-restraint in the interest of co-operation on the field of anticompetitive practices."

Recommendation of the Council concerning Cooperation between Member Countries on Anticompetitive Practices affecting International Trade, adopted July 27, 1995, OECD Doc. No. C(95)130/FINAL. More recently, the OECD charged its members to "cooperate with each other in enforcing their laws against [hard core] cartels," and to "conduct their own enforcement activities in accordance with principles of comity when they affect other countries' important interests." *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels,* adopted March 25, 1998, OECD Doc. No. C(98)35/FINAL.

Both U.S. and international law therefore require that courts considering the extraterritorial application of federal statutes interpret such statutes with deference to foreign nations' interests. The court below ignored those interests, however, and review is warranted to ensure that its overly expansive interpretation of U.S. antitrust law does not impinge on foreign countries' sovereignty.

B. The court of appeals' decision is inconsistent with Congress's expressed intention to promote deference to foreign governments in this context.

The court of appeals ignored the interests of foreign nations largely by relying upon the principle that antitrust exemptions should be narrowly construed. Pet. App. 11a-14a. But that principle did not originate in cases involving extraterritorial regulation, let alone *criminal* extraterritorial regulation. And the cases cited by the court below as support for the principle by and large involve domestic regulation. See *Union Labor Life Ins. Co.* v. *Pireno,* 458 U.S. 119, 126 (1982) (domestic health insurers' peer review is not "business of insurance" for purposes of McCarran-Ferguson Act); *Group Life & Health Ins. Co.* v. *Royal Drug Co.,* 440 U.S. 205, 231 (1979) (insurers' agreements with pharmacies are not exempted by McCarran-Ferguson Act); *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 374 (1973) (domestic power companies are not exempt from Sherman Act); *United States*

v. *McKesson & Robbins*, 351 U.S. 305, 316 (1956) (Miller-Tydings Act does not exempt price-fixing of domestic drug companies); *United States* v. *Borden Co.*, 308 U.S. 188, 198-200 (1939) (Agricultural Marketing Agreement Act does not exempt price-fixing in milk).

1. To be sure, two of the cases that the court below cited to support its narrowing construction did involve the Shipping Act. See *Federal Maritime Comm'n* v. *Seatrain Lines, Inc.*, 411 U.S. 726 (1973); *Carnation Co.* v. *Pacific Westbound Conf.*, 383 U.S. 213 (1966). But those cases provide no support for the court's conclusion. To begin with, the parties in those cases were arguing for an exemption on the basis of *implied* repeals, which of course are disfavored. See *Seatrain*, 411 U.S. at 733; *Carnation*, 383 U.S. at 217. Here, by contrast, the issue here is the proper interpretation of three *express* antitrust exemptions.

Moreover, both of the Shipping Act cases relied upon by the court of appeals predate the 1984 amendments to the Shipping Act, and the history of those amendments demonstrates the impropriety of relying on a narrowing construction here. The 1984 amendments were adopted in large part out of "concern about undue extension of antitrust principles into regulation of international maritime transportation and unequal treatment between U.S. flag and foreign flag carriers." H.R. Rep. No. 98-53, pt. I, at 9 (1983). Indeed, Congress criticized this Court's decision in *Carnation* on the ground that it "confirmed those concerns" in giving "disproportionate weight" to "[a]ntitrust standards" in the international transportation market, *id.* at 9 & n.1. Thus, Congress sought in the 1984 amendments "to legislatively overturn *Carnation*." S. Rep. No. 97-414, at 8 (1982).

It is therefore ironic, to say the least, that the court of appeals would rely on these pre-1984 cases to hold that it was required to adopt a narrowing construction of the Act's antitrust exemptions. Compare, *e.g.*, *Carnation*, 383 U.S. at

218 ("The Congress which enacted the Shipping Act was not hostile to antitrust regulation."), with S. Rep. No. 97-414, at 26, 34 ("[T]he antitrust laws will have no place with respect to activities and agreements authorized or prohibited under this bill"). Contrary to the court of appeals, to the extent that there is any ambiguity in the Shipping Act exemptions, deference to foreign nations' interests requires that the Act be interpreted *not* to apply extraterritorially.

2. More generally, the history of the Shipping Act of 1984 confirms that Congress was influenced by the sovereign interests of foreign nations in determining the extent to which it would exercise its prescriptive jurisdiction under the Act. Under the prior regime, U.S. officials had indicted "foreign citizens employed by foreign lines" under the U.S. antitrust laws, and "several governments protested the indictments." H.R. Rep. No. 98-53, pt. 1, at 7. Some nations objected to U.S. jurisdiction "on the ground that what the executives had done was not illegal in their home countries and, thus, they should not be subjected to prosecution in the United States." *Ibid.* Others objected on the ground that "the parties never contemplated the double jeopardy to which they had been exposed" (*ibid.*)—precisely the problem now faced by the defendants here as a result of the ongoing German investigation.

Thus, as Senator Gorton, the 1984 Act's sponsor, stated concerning prior law:

> [T]he regulatory system strains our international relations. Our trading partners claim the extension of our antitrust laws constitutes an outrageous intermeddling in international commerce, which subjects foreign carriers and shippers to laws and general competitive concepts that are completely foreign to them. In fact, some European nations ... have passed "blocking statutes" which prevent their companies from responding to and cooperating with the Department of Justice when it seeks to exercise its antitrust authority.

Cong. Rec. S1677 (Feb. 24, 1983).[5] Congress was thus "concern[ed] about undue extension of antitrust principles into regulation of international maritime transportation." H.R. Rep. No. 98-53, pt. I, at 9.

It was against this backdrop that Congress adopted the new Shipping Act exemption. In so doing, Congress "recognize[d] the strong public benefits in pursuing regulatory policies in a manner that maintains harmonious and cooperative international relations." *Id.* pt. 2, at 19. Indeed, Congress openly "acknowledge[d] the need of our foreign policy to adjust to the realities of other governments' laws and policies, even if counter to our competition principles." *Ibid.* And Congress charged federal officials to "exercise [their] authority ... with sensitivity to the goals of our foreign policy and the fostering of international comity." *Id.* at 20, 21.

In short, the Shipping Act exemption was a textbook example of Congress "seek[ing] to follow" the "principles of customary international law." *Empagran*, 542 U.S. at 164.

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[5] Accord Cong. Rec. S1487 (Feb. 22, 1983) (statement of Sen. Gorton); *1981 Shipping Act: Hearing Before Subcomm. on Merchant Marine of the Sen. Comm. on Commerce, Science, and Transp.*, 97th Cong. 208 (1981) (statement of Dr. Henry De La Trobe, Vice Chairman, Council of European and Japanese Nat'l Shipowners Ass'n) ("other countries take strong issue with the application of the antitrust laws as well as the Shipping Act to transportation arrangements and activities performed within their jurisdictions"); Cong. Rec. S1679 (Feb. 24, 1983) (statement of Sen. Inouye) (noting that the United Kingdom, Belgium, Sweden, France, Finland, the Netherlands, Germany, Australia, and Norway had enacted blocking statutes); see also A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257, 258 (1981) (summarizing the history of the British blocking statute and stating that "[t]he main concern of the prolonged Anglo-American disagreement over jurisdiction is the extraterritorial scope of American antitrust laws and of the regulations, particularly those relating to the shipping industry").

And the contrasting failure of the court below to "take[] account of the legitimate sovereign interests of other nations" (*ibid.*) warrants review by this Court.

II. The Court Of Appeals' Interpretation Of The Shipping Act Threatens Negative Consequences for Global Antitrust Enforcement.

The court of appeals' failure to accord any deference to the interests of foreign nations in interpreting the Shipping Act's antitrust exemptions also threatens adverse effects on global antitrust enforcement. As shown below, the decision impinges on the prerogative of foreign nations to regulate anticompetitive behavior in ways that, while distinct from the U.S. approach, nevertheless serve the same ends. The decision below also threatens to remove the incentive for foreign firms to take part in foreign leniency programs, the success of which depends upon certainty that their cooperation will protect them from *any* further liability, and certainly from *criminal liability* in the United States.

A. The decision below impedes other nations' ability to regulate competitive behavior in ways that differ from U.S. law.

There can be no doubt that the decision below threatens to impinge on foreign nations' legitimate choices about how to regulate their markets. To be sure, price-fixing is prohibited almost universally, and the ongoing German investigations discussed above confirm that other nations already have laws that punish and deter anticompetitive behavior. Conduct like that involved here will rarely if ever go unregulated and unpunished.[6]

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[6] Of course, the United States is free to invoke its "positive comity" agreement with the EU, under which it may request that the EU initiate enforcement activities. The United States and the EU have had a comity agreement in place since 1991, and the two parties built upon that agreement in 1998. See *Agreement Between*

1. Still, there are critical differences between the regulatory approaches of foreign sovereigns and those of the United States, and imposing the U.S. approach on foreign nations can disrupt the enforcement of their laws. For instance, while the U.S. in this case brought a criminal action, Belgian officials rely primarily upon administrative enforcement bodies to investigate and prosecute violations of the Belgian Act. These bodies include the Competition Service, which is responsible for detecting restrictive practices; the Corps of Rapporteurs, which organizes investigations and issues reports; and the Competition Council, an administrative court with the authority to render decisions.[7] Likewise, Germany's and the EU's deterrence efforts focus on quasi-criminal administrative prosecution. See Jason Hoerner, *Competition Law in the European Union: A Dual Enforcement System*, available at http:// www. antitrust. de/kartellrecht. htm. These approaches lack the stigma of a full-blown criminal prosecution and involve no risk of incarceration – important differences to firms in these jurisdictions.

There are also substantive differences between U.S. and foreign law. For example, the EU's "Article 81 is of wider ambit than Section 1 of the Sherman Act and can catch conduct ... which involves a lesser degree of culpability

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the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, June 4, 1998, reprinted at 37 I.L.M. 1070 (1998). Among the Agreement's purposes is to "[e]stablish cooperative procedures to achieve the most effective and efficient enforcement of competition law, whereby the competition authorities of each Party will normally avoid allocating enforcement resources to dealing with anticompetitive activities that occur principally in and are directed principally towards the other Party's territory." *Id.* at 1071.

[7] An English translation of the Belgian Act is available at: http://mineco.fgov.be/redir_new.asp?loc=organization_market/competition/competition_en_002.htm.

than its U.S. counterpart." Roderick Lambert, *Parallel Antitrust Investigations: The Long Arm of the DOJ from the Perspective of an E.U. Defense Counsel*, 14 LOY. CONSUMER L. REV. 509, 519 (2002). Moreover, the "Court of Justice has emphasized that [EU competition law] is not the same as the Sherman Act in that there are no per se violations" under EU law. *Ibid.* In addition, while U.S. authorities determine the lawfulness of certain agreements restraining trade by applying a "rule of reason" analysis, the Belgian and German laws contain broad prohibitions of cartels with enumerated exceptions. Belgian Act, art. 2, § 1, art. 2, § 3; GWB, §§ 1-3. These are just a handful of the important differences between U.S. and European law.

That is not to say that foreign enforcement is any less vigorous than American enforcement. But the varying approaches of jurisdictions such as Belgium, Germany, and the EU sometimes result in different decisions as to the method of enforcement or even whether enforcement is appropriate at all.

2. These differences create an obvious possibility of conflict if U.S. authorities attempt to apply U.S. antitrust law to foreign conduct. For example, if a European jurisdiction concludes that an activity conducted on its soil is pro- rather than anti-competitive, a decision by U.S. authorities to challenge that same conduct will undermine implementation of the European jurisdiction's competition policy.

Further, regardless of whether the various systems produce different outcomes, U.S. law should not trump the right of foreign nations to make and apply their own competition policies. As the Justice Department has noted: "the more that the conduct of foreign businesses in foreign countries becomes subject to the regulatory effect of decisions by United States courts, the more our antitrust laws risk impinging inappropriately on the economic policies and sovereignties of foreign countries." See Makan

Delrahim, *Department of Justice Perspectives on International Antitrust Enforcement: Recent Legal Developments and Policy Implications*, Speech Before the American Bar Association Section on Antitrust law, Washington, D.C. (Nov. 18, 2003), available at http://www.usdoj.gov/atr/public/speeches/201509.htm.

Without so much as considering the fundamental right of foreign sovereigns to regulate their own markets, the court of appeals extended the U.S. antitrust laws to conduct that took place almost entirely within foreign jurisdictions. That decision warrants review by this Court.

B. The court of appeals' reading of the Shipping Act exemptions destroys the incentive for foreign firms to cooperate with foreign antitrust authorities.

The court of appeals' decision also creates a more specific threat to foreign antitrust enforcement, i.e., by reducing foreign firms' incentive to cooperate with foreign antitrust authorities. As this Court recognized in *Empagran*, the prospect of liability under U.S. law "undermine[s] foreign nations' own antitrust enforcement policies by diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty." 542 U.S. at 168. Left unchecked, the decision below poses a far greater threat to foreign firms' cooperation with antitrust authorities than did the private actions at issue in *Empagran*.

As noted above, price-fixing and other anticompetitive cartel arrangements are expressly prohibited by Article 81 of the treaty establishing the European Community, and the Commission vigorously enforces that prohibition.[8] The

[8] The EC's Competition Directorate-General is devoted exclusively to detecting and combating cartels, and the Commission has imposed €1,096,449,100 in fines since 2003. See http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/05/454&format=HTML&aged=0&language=en&guiLanguage=en.

Commission's recently expanded leniency policy, however, grants total immunity to the first firms that provide insider information that either discloses a previously undetected cartel or leads to successful prosecution of the cartel members. In addition, the program provides reduced fines for companies that fail to qualify for immunity but provide "significant added value" to the Commission's investigation and terminate their participation in the cartel.[9] The first company that satisfies these conditions is eligible to receive a 30-50 percent reduction in fines, the second company a 20-30 percent reduction, and subsequent companies a reduction of up to 20 percent.[10]

The Commission's leniency program thus seeks to balance interests of disclosure, deterrence, and punishment against effective enforcement, a balance it achieves through the prospect of immunity or reduced and fixed penalties.[11] Not surprisingly, this system provides a powerful incentive for European firms to disclose information about cartels.

The incentive to cooperate is undermined, however, if a foreign company risks subjecting itself to *criminal prosecution* by U.S. authorities for confessing to the Commission that it has participated in price-fixing within its jurisdiction. As a U.S. Justice Department official recently stated in reference to the U.S. amnesty program, firms are unlikely to apply for leniency "[i]f [they] cannot predict, with a high degree of certainty, their treatment following cooperation. ... Uncertainty ... will kill an amnesty program." Scott D.

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[9] Http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/02/247&format=HTML&aged=1&language=EN&guiLanguage=en.

[10] *Ibid.*

[11] See Official Journal of the European Communities, Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases ¶ 3 (2002/C 45/03); Http://europa.eu.int/rapid/press ReleasesAction.do?reference=IP/02/247&format=HTML&aged=1&language=EN&guiLanguage=en.

Hammond, *Lessons Common to Detecting and Deterring Cartel Activity*, Address at the 3rd Nordic Competition Policy Conference (Sept. 12, 2000), available at http://www.usdoj.gov/atr/public/speeches/6487.htm.[12]

In short, the prospect of potentially ruinous criminal liability in U.S. courts—perhaps dual liability, depending on the extent to which Commission officials offer leniency—far outweighs the benefits that most companies would receive from taking part in a foreign leniency program. See, *e.g.*, Jason D. Medinger, Comment, *Antitrust Leniency Programs: A Call for Increased Harmonization as Proliferating Programs Undermine Deterrence*, 52 EMORY L. J. 1439, 1448 (2003) ("the fact that a confession in the EU may expose a cartel member to a U.S. investigation, which may result in jail time," makes the program "less attractive").

The court of appeals gave no consideration to these important factors in adopting its narrow construction of the Shipping Act's antitrust exemptions. But its decision directly threatens the antitrust enforcement efforts of foreign nations that offer leniency to their corporate citizens. In the process, that decision *undermines* the policy of detecting and deterring illegal price fixing that underlies the Sherman Act. Certiorari is warranted to correct that fundamental error.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[12] The Department of Justice has similar leniency programs. See U.S. Department of Justice Antitrust Division, *Corporate Leniency Policy* (Aug. 10, 1993); U.S. Department of Justice Antitrust Division, *Individual Leniency Policy* (Aug. 10, 1994).

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